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United States Circuit Court of Appeals
For the Ninth Circuit

No. 6111

WILHELM WILHELMSSEN
LIBELANT AND APPELLEE

vs.

THE BARK "THIELBEK," Knohr & Burchard, Nfl.
CLAIMANTS AND APPELLEES

THE PORT OF PORTLAND
RESPONDENT AND APPELLANT

No. 6116

KNOHR & BURCHARD, Nfl.
LIBELANT AND APPELLEE

vs.

THE "THODE FAGELUND," Wilhelm Wilhelmsen
CLAIMANT AND APPELLANT

THE PORT OF PORTLAND
RESPONDENT AND APPELLANT

Brief for Appellant, The Port of Portland

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Claimants and Appellees,
THE PORT OF PORTLAND,
Respondent and Appellant.

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KNOHR & BURCHARD, Nfl.,
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v.

THE "THODE FAGELUND,"
Wilhelm Wilhelmsen,
Claimant and Appellant,
THE PORT OF PORTLAND,
Respondent and Appellant.

Brief of Appellant, The Port of Portland

STATEMENT

This controversy arises out of a collision in Astoria Harbor on the morning of the 24th of August, 1913, between the steamship "Thode Fage-

lund," fully laden and going to sea, and the four-masted bark "Thielbek," in ballast, in tow of the "Ocklahama," a stern-wheel tow-boat, owned and operated by The Port of Portland.

The amount of damages as ascertained by the trial court is not in controversy, as all parties are satisfied with the awards made by the trial court.

The "Thode Fagelund" is a steamship 350 feet in length and was fully laden with cargo consisting mainly of lumber loaded at points on the Willamette and Columbia Rivers, and was under time charter to W. R. Grace & Company. It came down the river on the evening of the 23rd of August, 1913, in charge of a pilot, a member of the Columbia River Pilot Association and not in the employ of The Port of Portland, and it anchored in Astoria Harbor near Flash-Buoy No. 2, as shown on Claimant's Exhibit No. 2 (Apostles, page 1423), about 9:40 p. m. About this hour M. Nolan, a pilot regularly employed by The Port of Portland, in pursuance of an order of the superintendent of towage and pilotage of The Port, went on board for the purpose of piloting this steamship to the open sea, the master of the vessel having theretofore applied to The Port of Portland for a bar pilot. Nolan was a pilot of five years' experience on the waters where the collision occurred.

At this time there was anchored in the Astoria Harbor, at a point approximately a thousand feet below the point of anchorage of the "Thode Fagelund," the United States dredge "Chinook," about

450 feet in length. This point is approximately shown on Wilhelmsen, Nolan Exhibit 4 (Apostles, page 1417). This dredge was anchored on the north side of the harbor and was swinging with the tide, but being of lighter draught was not affected by the tide so quickly as the "Thode Fagelund." It stood high out of the water, so high that from where Pilot Nolan stood on the "Thode Fagelund" on the morning of the collision none of the lights of the "Ocklahama" could be seen over the "Chinook" for two-thirds of her length, and in like manner the running lights of the "Thode Fagelund" could not be seen from the "Ocklahama" or the "Thielbek."

On the evening of the 23rd of August, 1913, the master of the "Thielbek," a German bark about 300 feet in length, applied to The Port of Portland for a tow-boat to tow said vessel from its anchorage to the City of Portland for loading. At this time the "Thielbek" was anchored approximately three miles below the point where the "Thode Fagelund" was anchored. The approximate anchorage of the "Thielbek" is shown on Claimant's Exhibit 2, (Apostles, page 1423). About 10:40 p. m. of that day the "Ocklahama" reached the "Thielbek" and was lashed to the "Thielbek." This tow-boat was one of the most powerful tow-boats on the river, fully equipped and manned and employed regularly in towing vessels of this character up and down the Columbia and Willamette Rivers between the anchorage grounds where the "Thielbek" was anchored and the southernmost boundaries of The

Port of Portland. Her master was Isaac Turppa, by whom the tow-boat was taken to the "Thielbek" and under whose directions the "Thielbek" was lashed to the "Ocklahama"; but after this was accomplished he went to bed and knew nothing more of what happened until immediately prior to the collision. The pilot upon the "Ocklahama" was A. L. Pease, Jr., a duly licensed pilot regularly employed by The Port of Portland, who had been engaged upon the "Ocklahama" as pilot for approximately one year prior to the collision. Between the point of anchorage of the "Thode Fagelund" and the point of anchorage of the "Thielbek" the view was entirely unobstructed except in so far as the same was obstructed by the "Chinook" swinging on the flood and ebb tides as above described.

The Port of Portland is a municipal corporation created and organized under an Act of the Legislative Assembly of the State of Oregon in 1891. Its territorial boundaries were extended by an Act of 1901 and by the same act its powers were enlarged, but under neither of these acts did it have the power to engage in towage and pilotage. In 1908 an act was proposed by initiative petition and duly adopted by the legal voters whereby the powers of The Port of Portland were again enlarged. By this act it was "authorized and empowered to establish and maintain an efficient towage and pilotage service between the corporate limits of The Port of Portland and the open sea." This act contains a limitation clause as follows:

“If a vessel or cargo, while being towed by a vessel owned or operated by The Port of Portland, or while under the charge of a pilot employee of The Port of Portland, is injured or lost by reason of the fault of such tug, or the negligence or incompetence of such pilot, The Port of Portland shall not be liable for any loss or injury thereof in excess of \$10,000.”

The ship channel of the river from where the “Thode Fagelund” was anchored to the point where the “Thielbek” was anchored is more than a thousand feet in width at the narrowest place, and at the place of the collision is approximately fifteen hundred feet in width.

The “Thode Fagelund” had on deck beside the pilot Nolan, who was on top of the wheel-house, its master, M. B. Hansen, who was standing on the bridge about seven feet below the pilot, the steersman, Rasmussen, who was at the wheel and also on the bridge, and the mate or first officer, J. A. Hansen, who was on the top deck of the forecastle head and who was in charge of the anchors and also acting as lookout.

On the “Ocklahama” Pease, the pilot, was in charge and was in the pilot-house standing at the wheel about 33 feet above the water; W. R. Eckhart was the watchman and lookout and he was also in the pilot-house with Pease.

On the deck of the “Thielbek” was Gerdes, the lookout, who was forward on the forecastle head

(the testimony of this witness is so ambiguous, obscure and contradictory that it is not certain at what time he saw the "Thode Fagelund") ; William Eggars, first officer, who was in charge of the watch and was aft high up on the poop on the starboard side; and Oehring, third officer, who did not see the "Thode Fagelund" until after the passing signals were given and exchanged.

Nolan, the pilot, Hansen, the master, and Hansen, the first officer, of the "Thode Fagelund," saw the "Thielbek" and "Ocklahama" at practically the same instant and each of them was keeping a good outlook. The pilot, however, saw not only the rigging of the "Thielbek" but at the same time saw the towing lights or mast lights and the running lights of the "Ocklahama." There is some question whether the red light of the "Thielbek" was burning or not. The green light of the "Ocklahama" was not burning, but a green light was on the starboard side of the "Thielbek" and burning there. Hansen, the master, and Hansen, the mate, seemingly saw at first only the rigging of the "Thielbek," but they were standing seven feet below Nolan, the pilot. The running lights of the "Thielbek" and "Ocklahama" were in view of those on the "Thode Fagelund" until immediately prior to the collision, when the red lights were shut out and the "Ocklahama" was obscured by the "Thielbek," as she was a much shorter vessel and lashed to the aft quarter on the port side of the "Thielbek." From the "Ocklahama" the range lights on the "Thode Fagelund" were

seen above and over the "Chinook" and were open, and the green light was seen also over and beyond the "Chinook" for a moment and then was shut out of sight and was not seen again until about the time the second passing signal was given by the "Thode Fagelund." The green light of the "Thode Fagelund" remained in view until immediately before the collision and the red light during this time was shut out, but immediately before the collision the red light flashed in view of those on the "Ocklahoma." On the "Chinook" there was an anchor light forward and one aft, and about seven lights between these lights. These anchor lights seemingly were observed by first officer Eggars on the "Thielbek" well on the port side of the course of the "Thielbek." Afterward he saw the two masthead lights and the green light of the "Thode Fagelund," which showed just clear of the "Thielbek" on the starboard side and clear of the "Chinook." Immediately before the collision he saw the red light of the "Thode Fagelund."

Under the rules of The Port of Portland its masters and pilots were required to make reports of all accidents. The report of M. Nolan, the pilot on board the "Thode Fagelund," made on the day of the collision, is as follows (Apostles, pages 900 and 901) :

"Astoria, August 24th, 1913, at 3:20 a. m., S. S. 'Thode Fagelund' weighed anchor from off the O.-W. R. & N. Dock; started ahead under a slow bell; in about five minutes' time speed was in-

creased to half speed ahead. The dredge 'Chinook' was at anchor off, and at about the middle, of the O.-W. R. & N. Dock laying directly across the channel, leaving the channel obscured that one could not see an approaching vessel. When within about one ship's length from the 'Chinook,' which was swinging to flood tide and her stern towards the Astoria side of the channel, I saw a sailing vessel under tow almost ahead on, or about one-quarter of one point on our starboard bow; I blew two whistles to pass on the starboard and received no answer; stopped our engine and blew two whistles again and was answered by two whistles from the steamer 'Ocklahama,' which was towing the ship 'Thielbek.' I then backed full speed astern, and blew danger signal (four whistles), which was not answered. I then let go port anchor with fifteen fathom of chain, blew four whistles again, which were not answered. As the steamer 'Thode Fagelund's' headway was about stopped, anchor down with fifteen fathoms of chain on it, engine backing full speed astern it caused the steamer's head to swing to starboard about one-half of one point. The ship 'Thielbek' struck the steamer 'Thode Fagelund,' at 3:32 a. m., on the stern head, cutting her on the port bow below the water line. The 'Thode Fagelund's' headway was about stopped, engines backing full speed astern, port anchor down with fifteen fathom of chain when the ship 'Thielbek' struck her. The steamer 'Thode Fagelund' was under way only twelve minutes when struck, and had gone

only about one thousand feet and had very little more than steering way on her up to the time of the accident. The 'Thode Fagelund' remained in the same position all day, and on Monday at 10:30 a. m. was moved to an anchorage off Tongue Point."

The report of Pilot Pease, who had charge of the tow-boat and her tow, made on the same day, is as follows (Apostles, pages 1142 and 1143) :

"At about 3:20 on August twenty-fourth, as I was passing Callender Dock in Astoria Harbor with the bark 'Thielbek' in tow, I saw the green light and the two masthead lights of a steamer on my port bow. I could see the lights of this steamer, but could not see the steamer herself, on account of the dredge 'Chinook' being anchored on my port bow, and between the steamer and myself.

"As soon as I saw the steamer's lights, I slowed down, and she blew me two whistles, and I put my helm hard astarboard, but hesitated to answer her signal until she came out from behind the dredge. As she was coming out from behind the dredge she blew me two whistles again and as it looked to me as she could pass on my starboard side I answered her and shortly after stopped and backed full speed on a port helm. The steamer, instead of swinging to her port, or even holding her course, kept swinging to her starboard until I could see her red light.

"After I had been backing full speed for between three and four minutes, and had most of the headway off the bark, the steamer let go her anchor and

a few seconds later the bark and the steamer came together head on."

This officer also made a report to the local United States Inspectors in Portland. This was made on the same day and is as follows (Apostles, pages 1147 and 1148) :

"At about three-twenty on August twenty-fourth, as I was passing Callender Dock, in Astoria Harbor, with the bark 'Thielbek' in tow, I saw the green light and the two masthead lights of a steamer on my port bow. I could see the lights of this steamer, but could not see the steamer herself on account of the dredge 'Chinook' being anchored on my port bow, and between the steamer and myself. As soon as I saw the steamer's lights I slowed down, and she blew me two whistles, and I put my helm hard astarboard, but hesitated to answer her signal until she came out from behind the stern of the dredge. As she was coming out from behind the dredge, she blew me two whistles again, and as it looked to me that she could pass on my starboard side, I answered her, and shortly after stopped, and backed full speed on a port helm.

"The steamer, instead of swinging to her port, or even holding her course, kept swinging to her starboard until I could see her red light.

"After I had been backing full speed for between three and four minutes and had a great deal of the headway off the bark, the steamer dropped her anchor and a few seconds later the steamer and

the bark came together head-on, tearing a large hole in the steamer on her port side a few feet from the bow and driving the bark's anchor through a few plates and denting a number of others on both sides of her bow.

"This collision occurred at about three twenty-five in the morning abreast the O.-W. R. & N. Dock.

"I got the two vessels apart in about one hour and a half, and as the steamer said she needed no assistance I left her anchored there."

Seemingly a careful lookout was kept on both the "Thode Fagelund" and the "Ocklahama," and the "Thode Fagelund" was seen from the "Ocklahama" at practically the same instant at which the "Ocklahama" was seen from the "Thode Fagelund." At this time the vessels were about fifteen hundred feet distant from one another.

The "Thode Fagelund" left her anchorage and navigated under a slow bell for about five minutes. She then navigated under half speed bell for about five minutes; before the "Ocklahama" and "Thielbek" were seen she was navigating under a starboard helm, which was necessary in order to enable her to pass the stern of the "Chinook." Almost as soon as the "Ocklahama" and "Thielbek" were seen she was put under a hard astarboard helm and continued under this helm until the collision. Immediately after the "Ocklahama" and "Thielbek" were seen from the "Thode Fagelund" the "Thode Fagelund" gave two whistles as a passing signal. This

signal was not answered, and thereupon the "Thode Fagelund" at once stopped her engines. Within ten or twelve seconds after the first passing signal the "Thode Fagelund" repeated the passing signal by giving two whistles and this signal was promptly answered by the "Ocklahama" with two whistles. The "Ocklahama," before she saw the "Thode Fagelund," was proceeding up the river with her tow, full speed ahead, and making about six miles an hour, which was the customary speed for boats towing ships of this character under circumstances such as then prevailed. The night was clear but dark. As soon as the "Thode Fagelund" was seen the officers of the "Ocklahama" reduced her speed to half speed. At that time she was proceeding at a distance of from 150 to 350 feet from the Astoria dock line and under a slight port helm so as to keep at about the same distance from the Astoria shore. When the signals were exchanged the "Ocklahama" at once went under the hard astarboard helm. Meanwhile her speed had been reduced from half speed to stop and then for some time prior to the collision to full speed astern, but her headway had not been entirely eliminated, as the tide was flooding. The course of the "Thode Fagelund" at the time that she gave the passing signals and was proceeding under a starboard helm was such as to carry this steamship about one hundred feet aft of the "Chinook." At this time the steamship was about three hundred and fifty feet, one boat's length, from and above the stern of the

"Chinook." After the second passing signal was given and answered the "Thode Fagelund" blew four whistles and then went full speed astern, but gave no signal indicating that her engines were reversed, and she continued to go full speed astern until the collision, keeping her helm hard astarboard. After giving the four whistles she let go her port anchor and then again blew four whistles. It appears from the testimony of those on board the "Thode Fagelund" that if the "Ocklahama" and her tow had kept their course at the time of the first signal and the "Thode Fagelund" had maintained her course there would have been a collision, and that such a collision could have been prevented only by the "Ocklahama" and her tow bearing to port on a starboard helm. From the testimony of the same witnesses this was true at the time the second passing signal was given and answered, and at either of these times, in the judgment of the pilot on the "Thode Fagelund" and of her master, a passing to port was impossible, as to accomplish this the "Thode Fagelund" would have collided with the "Chinook."

The "Thode Fagelund" in backing throws her bow to starboard. The collision occurred between 50 and 200 feet from the "Chinook" and just abreast of the "Chinook," the "Thode Fagelund" having passed the stern of the "Chinook." At the time of the collision the navigable water between the stern of the "Chinook" and the Astoria docks was between 700 and 800 feet in width. The "Thielbek" struck

the "Thode Fagelund" on the port side about 25 feet from the bow.

No question is made of the capacity of the "Ocklahama" to tow the "Thielbek," and there is no claim that anyone was deceived or misled by the running lights of either vessel.

The first libel filed was filed on behalf of the owner of the "Thode Fagelund," a libel *in rem* against the "Thielbek" and *in personam* against The Port of Portland. In this libel it is charged that the "Ocklahama" and "Thielbek" were negligently and carelessly and imprudently navigated in certain particulars:

1. That the officer in charge of the "Ocklahama" was inexperienced.

2. That no lookout was kept upon the "Thielbek" or upon the "Ocklahama."

3. That the "Ocklahama" and "Thielbek" were navigated with a varying helm.

4. That the "Ocklahama" did not promptly answer the passing signals, or when she did answer did not observe and obey the same.

5. That the "Ocklahama" was operated at too high speed.

6. That the "Ocklahama" failed to act on or observe the known position of the dredge "Chinook" and the fact that the "Thode Fagelund" was departing on an outward-bound voyage on the turn of the tide.

7. That the officers of the "Ocklahama" and

“Thielbek” did not watch the compass bearing of the approach of the “Thode Fagelund.”

8. That when the pilot of the “Ocklahama” saw the red light of the “Thode Fagelund” he did not conduct his vessel as he should have done so as to pass safely between the “Thode Fagelund” and the railroad wharf in Astoria.

9. That the “Ocklahama” and the “Thielbek” did not give the “Thode Fagelund” sufficient clearway, either one side or the other of the available open channelway. (Article X, Apostles, pages 23 and 24.)

Each and all of these allegations of the libel were determined adversely to the “Thode Fagelund” by the trial court. The trial court entirely exculpated the “Ocklahama” and its officers and the “Thielbek” and its officers.

After the libel was filed on behalf of the “Thode Fagelund” a libel was filed on behalf of the owners of the “Thielbek” against the “Thode Fagelund” *in rem* and against The Port of Portland *in personam*. The allegations of negligence contained in this libel are:

1. That the “Thode Fagelund” approached the channel between the stern of the “Chinook” and the Astoria docks in such a manner that she was not under proper control.

2. That she blew two whistles and attempted to cross the bow of the “Ocklahama” and tow when the red light was showing to the “Thode Fagelund”

and her own green light only was showing to the "Ocklahama."

3. That after the passing signals had been given and agreed upon the "Thode Fagelund" altered her course to her own starboard and crowded the "Ocklahama" and "Thielbek" so close to the "Chinook" as to make the passing impossible.

4. That the "Thode Fagelund" reversed her engines full speed astern and did not signal by three whistles that her engines had been reversed.

In its answer to these several libels The Port of Portland pleaded affirmatively the law under which this service was performed and the limitation therein contained and hereinbefore set forth. It further pleaded affirmatively that its pilots were duly licensed and were authorized by virtue of their licenses to undertake the services which they were performing at the time of the collision, and that they were pilots of experience and familiar with the waters in which the collision occurred. Exceptions were filed to these affirmative matters or defenses and said exceptions were sustained by the trial court.

After hearing all the evidence the Court found that the "Thode Fagelund" was alone at fault; that she was not at fault in signaling for a starboard passage, when she should have signaled for a port passage, but that she was at fault in stopping and backing after giving the passing signals and after the passing signals had been accepted, and that she was at fault in failing to give signals to indicate that she

was backing. The Court further held, however, that the negligence of the "Thode Fagelund" should be imputed to Nolan, the pilot having charge of her navigation, and that inasmuch as he was an employee of The Port of Portland, The Port of Portland was responsible for the damages caused by his negligence. Under the opinion of the Court the "Thielbek" and her owners were therefore entitled to recover against The Port of Portland for the negligence of Pilot Nolan, inasmuch as the allegations of the libel against the "Thode Fagelund" and The Port of Portland had been sustained, but none of the allegations in the libel of Wilhelmsen, owner of the "Thode Fagelund" were sustained. Thereupon Wilhelmsen applied, *after the trial and after the opinion of the Court had been rendered*, for leave to amend his libel,—to abandon his original libel indeed, and to allege that the collision was caused by the negligence of Pilot Nolan, that he had charge of the navigation of the "Thode Fagelund," and that the collision was caused by his negligence in the particulars found by the trial court. This application, over the objection and exception of The Port of Portland, was granted and an amended libel filed to conform to the facts proved, and Wilhelmsen was granted a judgment and decree against The Port of Portland upon such finding and upon such amended libel.

While these causes were pending W. R. Grace & Company, time charterer and owner of the greater part of the cargo of the "Thode Fagelund," filed a

libel against the "Thielbek" *in rem* and against The Port of Portland *in personam*, adopting in all substantial respects the allegations of the libel of Wilhelm Wilhelmsen. About the same time E. I. du Pont de Nemours Powder Company, owner of a part of the cargo of the "Thode Fagelund," likewise filed a libel against the "Thielbek" *in rem* and against The Port of Portland *in personam*, also substantially adopting the allegations of the libel of Wilhelm Wilhelmsen. These two libels upon the trial were dismissed, and as the libelant in neither case has appealed these causes may be disregarded upon this appeal, though for the purposes of the appeal these causes are consolidated with the libel filed by Wilhelm Wilhelmsen and the libel filed by the owners of the "Thielbek."

The Port of Portland Not Answerable for Negligence of Its Pilot, Nolan

ASSIGNMENTS III and IV

(APOSTLES, PAGES 132, 133, 258, AND 259.)

The Port of Portland, as has been said, is a municipal corporation created and organized for the purpose of discharging certain duties recognized by the legislature of this state as of a public character. When first created in 1891 the object, purpose, and occupation as defined by Section 2 of the Act of 1891 was to improve the Willamette River at the Cities of Portland, East Portland, and Albina, and the Willamette and Columbia Rivers between said cities and the sea. These functions were purely

public and for this work The Port of Portland received nothing. It was given power to levy taxes to pay the expenses incurred in carrying on the purpose for which it was created, and as a public corporation it was compelled to discharge these duties. Its charter was amended in 1901, and by this act the object, purpose, and occupation of the corporation was declared to be to "promote the maritime shipping and commercial interests of The Port of Portland in all manner as in this act set out and contained or as it may hereafter be thereto specially authorized and empowered." It was given full power over the Willamette River and the Willamette and Columbia Rivers between the southerly boundary line of The Port of Portland and the open sea to the same extent to which the state of Oregon had power. By this Act it was also given power **in its discretion** to acquire, own, erect and operate a drydock, but it was not authorized to operate said drydock for profit and was expressly prohibited from carrying on the work of repairing, cleaning, and painting vessels, an occupation which is usually incident to the ownership and operation of a drydock. Indeed, the Act of 1901 clearly contemplates that the drydock should be operated at a loss, and provision was made to pay expenses by taxation. Discretion, as has been said, was given to The Port in the particular of the drydock, but no discretion in regard to other public functions vested in The Port.

In 1908 the charter of the City of Portland was

again amended, this time by initiative petition, and the powers of The Port were enlarged and extended so that in addition to the powers specifically granted under the Act of 1901 The Port was expressly authorized and empowered, **not in its discretion**, to establish and maintain an efficient towage and pilotage service between its boundaries and the open sea, and was given all powers necessary to carry this Act into effect. These powers, therefore, became recognized as public functions, and as public functions it was the bounden duty of The Port to discharge them, and it could not avoid this duty. The status of The Port, therefore, may be likened, so far as these duties are concerned, to that of vessels navigating certain waters where there is in effect a compulsory pilotage law.

It is true that vessels navigating the waters of Oregon, including the Columbia River, are not compelled to employ pilots at all. In other words, the pilotage law of this state is not a compulsory pilotage law; but in so far as The Port of Portland is concerned the law is compulsory, that is to say, The Port is compelled to maintain an efficient towage and pilotage service between Portland and the sea. To maintain this service it must employ pilots, and under the statutes of the state no one may act as pilot until he has been licensed (II L. O. L., Secs. 5165 and following). The Port cannot license a pilot; pilots must be licensed either by the proper representatives of the United States or by the proper representatives of the several states. Their

qualifications are prescribed by Sec. 5171, II L. O. L.; and under Sec. 5178, II L. O. L., the pilot and the sureties upon his official undertaking are liable for the damages caused by reason of his negligence or incompetency. A pilot's fees are fixed by law; and the law imposing these duties upon The Port of Portland limits the amount of its charges to the charges fixed by the State of Oregon for pilots, so that it is not contemplated that in this service The Port of Portland shall realize any profit. In other words, the duties which The Port performs are compulsory duties, to be performed for compensation not to exceed the cost. The Port therefore contends that under this law it occupies practically the same position which a vessel occupies under a compulsory pilotage act, and that it performs its duty if it furnishes a pilot who is licensed by the state of Oregon and who bears a certificate from the state showing that he has the qualifications to act as pilot.

Under the compulsory pilotage law the owner or master of a ship is not answerable *in personam* for any loss or damage occasioned by the fault or incapacity of any qualified pilot in charge of such ship.

Maclachlan, Law of Merchant Shipping, (5th Ed.) page 293.

Marsden's Collisions at Sea, (6th Ed.) Chapter 10, page 214.

The China v. Walsh, 74 U. S. (7 Wall.) 53.

Ralli v. Troop, 157 U. S. 386.

Homer Ramsdell Transportation Co. v. La Compagnie, 182 U. S. 406.

The W. G. Mason, The W. I. Babcock, 142 Fed. 913.

Guy v. Donald, 203 U. S. 245.

The Port, in other words, contends that when, in the discharge of its public duties, it furnishes to a vessel requesting the same a pilot whose qualifications are certified by the state of Oregon, such pilot becomes, when he goes upon the vessel, not the servant of The Port, but really the servant of the vessel, and that The Port has no power to control his action, and that therefore the doctrine of *respondeat superior* has no application. This would not relieve, of course, the "Thode Fagelund" from liability to the "Thielbek," as the pilot was unquestionably a servant of the steamship, but it would relieve, and, The Port contends, does relieve The Port from any liability for his action or for his negligence.

Furthermore, The Port contends that in the case at bar if there was negligence on the part of Nolan, the pilot of the "Thode Fagelund," there was the same negligence on the part of the master of the steamship "Thode Fagelund." He was present and giving orders to his crew, repeating, as he testifies, the orders of the pilot, and therefore approving and affirming the same, and he testifies that he repeated, and therefore approved and affirmed, each of the orders given by Pilot Nolan. The negligence of which Nolan is found guilty was in violating the

Navigation Rules. See opinion of Court (Apostles, page 90), wherein the Court finds that the negligence of which the "Thode Fagelund" was guilty was: first, in failing to execute the maneuver agreed upon; second, in stopping and backing after exchanging the passing signals, and especially without giving three blasts of her whistle indicating that she was doing so, as required by the Pilot Rules.

The fact that a vessel has a pilot to take charge of her navigation does not place the pilot in command of the vessel, but leaves the vessel in charge of the master. Note the language of Judge (afterwards Mr. Justice) Clifford of the Supreme Court, in 1 Clifford, 491:

"Vessels are not positively bound in any case, by the law of this State, to employ a pilot, whether going in or coming out of a harbor; but when inward bound, and a pilot seasonably offers his services and is ready to enter upon the duty, the ship must pay pilotage fees, even if his services are refused. While on board, the pilot, in the absence of the master, has the exclusive control and direction of the navigation of the vessel; but if the master is present, the power of the pilot does not so far supersede the authority of the master, that the latter may not, in case of obvious and certain disability, or gross ignorance and palpable and imminently dangerous mistake, disobey his

orders and interfere for the protection of the ship and the lives of those on board. Divided authority in a ship with reference to the same subject-matter is certainly not to be encouraged, and can never be justified or tolerated, except in cases of urgent and extreme necessity. While standing by and witnessing a self-evident mistake manifestly and imminently endangering the ship, and certain to cause a collision, the master should not remain silent, but might well interpose, so far at least as to point out the error, and suggest the proper corrective."

Again in *United States v. Forbes*, Crabbe, 558, Randall, J., says at page 561:

"The pilot is an officer of the ship when on board to pilot the vessel to or from the sea, and the crew are bound to obey his orders as such; but when the captain is on board he is master of the vessel, and the orders of the pilot are, in law, considered as the master's."

It should be borne in mind that The Port of Portland is not in the ordinary sense a municipal corporation. It does not belong to the same class of municipal corporations to which cities and towns belong, but rather to that class to which counties and school districts belong. In *Cook v. The Port of Portland*, 20 Ore. 580, the Supreme Court of the state held that The Port of Portland belongs to that class of municipal corporations sometimes called *quasi-corporations organized solely for gov-*

ernmental purposes and that the state at large is vitally interested in the work which The Port is authorized to do, though that part of the state embraced in its boundaries may reap the principal benefit from the moneys expended by The Port. Mr. Dillon in his work on Municipal Corporations, Sections 34 and following, clearly distinguishes between these classes of municipal corporations.

In Dillon on Municipal Corporations, Volume IV, Section 1611, it is said that when a corporation is created by public statute for definite and limited objects, to which its funds are to be applied, a contract which is entirely unconnected with those purposes, or which on its face will cause an illegal or wrongful application of its funds or an application to other objects, is *ultra vires* and void. The same author, Section 1647, states in speaking of the doctrine of *respondeat superior*, that municipal corporations fall within the operation of this rule and are liable accordingly to civil actions for damages when the requisite elements of liability co-exist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment, the extent of which powers all persons are bound, at their peril, to know; in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If

the act complained of necessarily lies wholly outside of the general or special powers of the corporation, as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act or whether it be done by its officers without its express command. In Section 1649 the author reviews this subject and among other things says:

“It is nowhere denied that a contract *ultra vires*, using the term *ultra vires* in the sense of meaning an act which is both intrinsically, wholly and necessarily beyond the possible scope of the chartered powers of the municipality, does not as such bind the municipality. As to torts or wrongful acts not resting upon contract, but which are *ultra vires* in the sense above explained, we do not see on what principle they can create an implied liability on the part of the municipality. If they may, of what use are the limitations of the chartered corporate powers? Certainly the rules laid down in the text are in accordance with the almost if not universal doctrine of the courts, and are, we think, sound.”

Under the powers conferred upon The Port of Portland by the original act of the legislature, as has been said, The Port had no power to engage in the towage business or in the pilotage business, and had it undertaken to tow the “Thielbek” or to supply

a pilot for the "Thode Fagelund" its act in either case would have been beyond the powers conferred by the legislature, and it would not have been bound either on the contract, if it should have attempted to contract, nor in tort, for negligence. In like manner, had this accident happened in waters which The Port of Portland was not authorized to navigate or to furnish pilots for, The Port of Portland would not have been liable, for the act in navigating the waters or in furnishing pilots for the same would have been *ultra vires*, and the corporation would not have been bound by contract nor liable for negligence.

It is questionable whether the legal voters of The Port of Portland had power to assume the new duties and responsibilities placed upon The Port by the amendment of 1908. It is questionable whether these powers are in their nature governmental.

In the exercise of the powers granted to it by the legislative Acts of 1891, 1893, and 1899, The Port exercised purely governmental powers, and in the exercise of such powers cannot be held liable for the negligence of its employees, for to hold The Port liable for such negligence is against public policy. This rule, that the Sovereign in the exercise of governmental functions cannot be held liable for the negligence of his or its employees, is too familiar to require the citation of authority. Perhaps the best illustration of this principle is the fact that neither the state nor the county is held liable for

the negligence of the sheriff nor indeed for any acts of the sheriff in the course of his official duties. This rule that the Sovereign cannot be held liable has been frequently recognized in admiralty. In *Workman v. New York*, cited *infra*, it is said:

“We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity, the sovereign of another country was not subject to be impleaded, no redress could be given.”

In the same case it is said:

“It is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations. True it is, that under the general law, growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the

levy on property held by the corporation for public uses."

The property, therefore, of The Port cannot be taken and sold to satisfy the judgment and decree of the Court in this case. This rule was followed in this Circuit in the case of *The John McCracken*, which decision is considered *infra*. How, then, it may be asked, can a judgment or decree in this cause, if rendered against The Port, be satisfied? That it cannot be satisfied by seizure and sale of the tangible property of The Port is plain. Can it be satisfied by taxation?

Under the legislative Acts of 1891, 1893, and 1899, The Port is authorized to borrow moneys to carry on the work of making and maintaining a channel to the sea not exceeding \$500,000.00, and to issue notes and bonds therefor, and it is authorized to assess, levy, and collect taxes annually not exceeding three-twentieths of one per cent. The moneys derived from these taxes are to be used in making and maintaining a channel and paying interest on the moneys borrowed and the principal of the debt when due. None of the moneys derived from this tax can be used to pay claims arising out of torts occurring in the towage and pilotage business.

The amended Act of 1901 undertakes to give The Port the power to build, hold, own, and operate a drydock and also to charge for the use of the same, but it is expressly provided that The Port shall not carry on the work of repairing, cleaning, or painting vessels. The same Act gives The Port

power to contract with the government of the United States for all or any part of the work of making and maintaining the channel, but the moneys derived from this source, if any, go into the fund with the moneys raised by the tax and must be expended in the same way. For the purpose of acquiring a site for and building a drydock The Port is by this Act authorized to borrow money not exceeding \$400,000.00, but the Act prohibits The Port from borrowing moneys for any other purposes. This Act also limits the taxing power of The Port to three-twentieths of one per cent, and restricts the purposes for which the moneys derived from this tax shall be used. The Port by this Act is also authorized to assess, levy, and collect an additional tax, the moneys derived from which shall go into a special fund known as the drydock fund, and this money can be used only for the payment of the interest and principal of the drydock bonds. The Port is also by this Act authorized to levy a special tax to build a new dredge, the moneys realized from the tax to go into a dredge fund and be used only for dredge fund purposes. Thus it appears that the moneys of the drydock fund can be used only for drydock purposes and the moneys in the dredge fund only for dredge purposes.

By the amendment of 1908 The Port is authorized to engage in the pilotage and towage business on the Columbia and Willamette Rivers and to charge and collect compensation (limited by the Act) for services of this character rendered by it.

It is a grave question whether the people had power to enact such an amendment, for the powers so assumed by the people are not governmental, but entirely different from those for the exercise of which The Port was created. If The Port has such powers there is no reason why a county or a school district might not assume like powers, or why an irrigation district or a drainage district might not in like manner enlarge the powers granted to it by the law under which it was incorporated. The fact that the people of the state have by constitutional amendments provided that the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, and that by Section 1a of Article IV the people have further provided that the initiative and referendum powers reserved to the people by the constitution are further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation of every character, in or for their respective municipalities and districts, does not authorize the people of a municipality or district to organize themselves into a municipality or district for purposes other than those for which such municipality or district was created. This doubt is corroborated by Article XI, Section 2, which provides that the legal voters of every city and town, but not the legal voters of other municipal corporations, are granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state

of Oregon. It would seem that the proper construction to put upon these constitutional amendments is that the legal voters of a municipal corporation have the right to enact local, special, and municipal legislation provided they keep within the powers for which such municipality was created, but that to assume powers other than those granted is to allow the people to create governmental districts, which would result in their passing laws antagonistic to one another and to the general constitution and laws of the state, a result which is not within either the letter or the spirit of the amendments. Such a construction would lead to conflicts between municipalities and to governmental chaos.

By this last amendment The Port is authorized to provide tug-boats and pilot-boats and place the same in condition for use, and to sell bonds to the extent of \$500,000.00. By this amendment it is also authorized to engage in the pilotage and towage business on the Columbia and Willamette Rivers, and to charge and collect for services of this character. To carry into effect its new powers conferred by this Act it is authorized to assess, levy, and collect a tax not to exceed one-fortieth of one per cent, and in addition thereto a special tax to pay the interest on the towage and pilotage bonds and the principal of said bonds as they mature. The moneys derived from this special tax, however, can be used only to pay the interest and principal of these bonds, but there seems to be no limitation on the use of the

moneys derived from the tax of one-fortieth of one per cent.

From the foregoing analysis of these several acts it appears to us clear (1) that to pay claims for damages arising out of any business which The Port may conduct, The Port can use only the funds derived from the tax of one-fortieth of one per cent authorized by the Act of 1908, and (2) that the moneys derived from these taxes is to carry on the towage and pilotage business conducted by The Port. In other words, they must continue this business and must provide funds for this purpose. If so, the moneys in this fund can be used only in so far as the same may not be needed to conduct the towage and pilotage business.

The amendment of 1908 intended to confer upon The Port powers and duties which are not governmental in their nature, but in adopting this amendment the people or legal voters intended also to limit the liability of The Port for damages resulting from the negligence of its employees.

Sutherland in his work on Statutory Construction, Section 325, says:

"(Expressio unius est exclusio alterius.)"

The maxim is applicable to a statutory provision which grants originally a power or right. In such cases the power or right originates with the statute, and exists only to the extent plainly granted. * * * Where a statute authorizes a public work, and points out a mode

in which parties injured thereby may obtain compensation, that remedy is exclusive, and the scope of the remedy or points of compensation are confined to the statutory limits.

* * * Every part of a statute must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not presumed that the legislature intended any part of a statute to be without meaning."

The same author, Section 371, says:

"If a statute creates a liability where otherwise none would exist, or increases a common law liability, it will be strictly construed. * * * The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act."

The same author, Section 390, says:

"Statutes which impose burdens, or liabilities unknown at common law, are construed strictly in favor of those on whom such burdens are imposed, or in favor of those who are subjected to such liabilities."

And in Section 398 the author emphasizes the rule that where rights depend upon the statutes creating them, these statutes are construed strictly.

In *The John McCracken*, 145 Fed. 705, on motion to vacate warrant of arrest, Wolverton, Dis-

trict Judge, cites and follows the case of *Cook v. The Port of Portland*, 20 Or. 580, to the effect that "all the purposes and powers of The Port of Portland are public, political or governmental," and on page 708 says:

"Thus it appears that the national government is as careful that the functions of the state governments, and the instrumentalities by which they are exercised and controlled, shall not be impinged upon, and their powers hampered and impeded, as it is jealous that its own organism be not shorn of any of its authority or fettered in the maintenance of its supremacy. * * * Indeed, it appears to me that the policy of the general government is in consonance with this view and that under that policy it is bound to accord to the municipality the same defense as if the libelant were a private suitor proceeding against the ships of such municipality."

In *United States v. Port of Portland*, 161 Fed. 193, libel *in personam* was brought against The Port of Portland for damages arising out of the same collision as the subject-matter of the suit of *The John McCracken*, *supra*. The District Court held that in the navigation of the dredge "Columbia," while in tow of the tug "McCracken," the employees of The Port of Portland were negligent, and entered a decree *in personam* against The Port of Portland, but the questions now raised were not

raised in the *McCraken* case, nor upon the appeal of that case (176 Fed. 866). The only issues involved were the responsibility for, or, to speak more accurately, the cause of, the collision and the amount of resulting damages, it seemingly being conceded that if the employees of The Port of Portland were negligent in the navigation of the dredge and tow-boat The Port of Portland must respond in damages. No limitation of liability was pleaded in this case, as it arose prior to the amendment of 1908.

The case at bar presents several questions not raised either in *The John McCracken* or in *United States v. The Port of Portland*. The first of these is whether or not The Port of Portland had power to engage in the towage or pilotage business. If it had no such power its acts were *ultra vires* and The Port would not be responsible; but, granting that it had such power, the power was conferred upon it by a public statute of which all persons must take notice, and the limitation contained in the statute is binding upon all persons who contract with The Port. (*Sutherland, Statutory Construction*, Sections 325, 371, and 390, *supra*. And in Section 398 the author emphasizes the rule that where rights depend upon the statutes creating them these statutes are construed strictly.)

Assuming that the "Ocklahama" and "Thielbek" were not at fault, the owners of the "Thielbek," if The Port had the power to engage in the business of pilotage, could recover from The Port

of Portland all damages sustained by the "Thielbek" through the negligence of Pilot Nolan, and the limitation would not apply in such case in so far as the damages were sustained by the "Thielbek," but the owners of the "Thode Fagelund" would not be entitled to recover any damages, or if entitled to recover any damages would be entitled to recover only damages within the statutory limitation. When the master of the "Thode Fagelund" contracted with The Port of Portland to furnish a pilot he is presumed to have contracted with full knowledge of the power of The Port and of the limitation upon its responsibility, and in order to recover he must rely upon the contract which he made with The Port of Portland and under which the pilot, Nolan, was furnished to him.

A familiar illustration of this rule is found in the case of torts of infants. An infant is liable in tort to the same extent as a person of full age and legal capacity would be, but if the wrong grows out of contractual relations and the injury consists in the non-performance by the infant of a contract into which the party damaged has entered with the infant, or if it results from the negligent manner in which the infant has performed such contract, the law will not permit the contract to be enforced indirectly when it cannot be enforced directly, and therefore will not hold the infant liable if it be necessary to prove the contract in order to establish the tort. (Cooley on Torts, page 123.) Upon this principle it has been uniformly

held that the doctrine of *respondet superior* has no application in the case of an infant employer, and that therefore he is not responsible for torts or negligence on the part of those in his service; for the relation of master and servant depends upon contract, and in order to hold the infant responsible it is necessary of course to prove the contract.

To hold The Port liable for damages resulting from the negligence of Nolan it is necessary to prove a contract between Nolan and The Port of Portland, that is to say, to prove that Nolan was employed to pilot ships under a contract with The Port of Portland. If The Port had no power to engage in the business of towing ships its contract with Nolan was *ultra vires*, and therefore the doctrine of *respondet superior* would have no application; and in that event neither the "Thielbek" or its owners nor the "Thode Fagelund" or its owner could recover damages from The Port of Portland; for in order to impose the liability upon The Port of Portland it would be necessary to prove the contract of employment under which Nolan was acting, and as such contract would be *ultra vires* The Port would not be bound. If, however, The Port had power to engage in the business of pilotage the contract between Nolan and The Port under which Nolan was employed could be proved, for it would not be *ultra vires*, and anyone sustaining injury or damage through the negligence of The Port's employee could recover damages. The amount of such damages, so far as the "Thielbek" and its

owners are concerned, would not be limited. The "Thode Fagelund" and its owner, however, stand upon a different principle and in a different situation. The master of this steamship entered into a contract with The Port of Portland, which contract he would be allowed to show. He would therefore be entitled to recover such damages as he could prove had been sustained by his ship up to the limitation of The Port of Portland's liability; but as the Act passed by the initiative giving this power to contract limits the liability for damages, parties contracting with The Port would be bound by the limitation and could recover no more than the amount which the Act permits.

ARGUMENT

The Cause of the Collision

ASSIGNMENTS IV AND V

(APOSTLES, PAGES 132 TO 133, AND 258 TO 259.)

The facts are quite fully found in the opinion of the Honorable Robert S. Bean (Apostles, pages 86 and following). Of the findings of fact The Port of Portland does not complain. Due consideration was given to all the evidence and the findings are fully supported by the evidence.

The Port of Portland submits, however, that the trial court failed to distinguish in its opinion between negligence and error of judgment on the part of those in charge of the navigation of the "Thode Fagelund." It finds (Apostles, page 90) that it is probably true that the close proximity of the "Thode

Fagelund" to the "Chinook" when the "Ocklahama" was sighted, the necessity of her going to port to clear the "Chinook," and the difficulty of thereafter swinging to starboard, justified a departure from Pilot Rules IV and X, and that up to the time that the passing signal was given there was no negligence on the part of those in charge of the "Thode Fagelund." The negligence charged, therefore, against the "Thode Fagelund" is:

First, her failing to attempt to execute the maneuver agreed upon, that is to say, that when the passing signals were given and agreed on it was the duty of the "Thode Fagelund" not to stop and back but to continue upon her course in accordance with the signals exchanged.

The Port of Portland claims that this does not constitute negligence, but rather an error of judgment.

One of the earliest cases distinguishing between negligence and error of judgment is *Reeves et al. v. The Ship "Constitution,"* decided in 1835 by Hopkinson, J., and reported in Gilpin's Reports, page 579 and following. The Court says, page 587:

"Do these facts make out a case of such negligence as will entitle the libelants to the indemnity they seek? I should say, they do not; for, supposing the pilot acted with good faith, and with his best judgment, which is not questioned, and granting that he misjudged, and miscalculated his chance of getting clear of the schooner, yet it was a mistake which, in such

a situation, where the chances were so nearly balanced, as we shall see, the most prudent man might have made in his own concerns. It discovers no such want of diligence as to be imputed as a fault in any man. He saw danger and difficulty on both sides; two evils to be avoided; he honestly, with his best judgment and skill, endeavored to avoid both, and betrayed neither carelessness nor ignorance in the attempt, although it was not successful. It is not uncommon for the best and wisest designs to miscarry."

In *The Packer*, 28 Fed. 156, Wallace, J., at page 160, says:

"But the tug is not to be held liable upon conjecture, nor is negligence to be imputed to those in charge merely because it appears, after the event, that the accident might not have happened if something had been done which was omitted. The question is whether they did all that other prudent and intelligent men would have ordinarily deemed it necessary to do under the same circumstances. Upon the proof this question should be answered in the affirmative."

In *The Startle*, 115 Fed. 555, the Court, by Gray, Circuit Judge, says on page 563:

"We see nothing in the facts disclosed in the record in this connection, which would justly impugn the fairness of the judgment

exercised by him under the circumstances detailed, nothing to show that he acted outside the limits of a fair discretion, in regard to what should be done under the circumstances that surrounded him. Even if, in the light of subsequent events, the course pursued by the captain of the tug should appear to have been a mistaken one, a mere mistake is not enough to charge the tug with the loss which followed. To make the tug liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made."

The leading case on this question is *The Grace Girdler*, 74 U. S. (7 Wall.) 196, decided by Mr. Justice Swayne. The Court says:

"The witnesses upon each vessel must have known the condition of things and what occurred there. Unless we impute perjury, which we see no reason to do, they are entitled to credence as to this class of facts. As to what occurred upon the other vessel they are liable to be mistaken, and their testimony is entitled to less weight than the testimony of witnesses who were present.

"In respect to the yacht, we pass by the inquiries whether she was properly manned, whether she had a sufficient lookout, and whether, by due vigilance and good seamanship she might not at her leisure have given the fer-

ryboat a safe berth, and thus have avoided the necessity of placing herself, as it were, by a leap, across the bows of the schooner. These points have not been pressed upon our attention by the learned counsel for the appellants, and in the view which we take of the case their solution is not necessary to its proper determination. The testimony of those on board of the yacht proves clearly that all was done in the emergency that was practicable and proper. *If there was any omission, under the circumstances it was an error and not a fault. In the eye of the law the former does not rise to the grade of the latter, and is always venial.* *Reeves v. The Constitution*, Gil. 587; *N. Y. & L. S. Co. v. Rumball*, 21 How. 383 (62 U. S. XVI, 148); *Gen. Chief v. Fitzhugh*, 12 How. 461. * * *

“Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. *The Europa*, 14 Jur., 629; *The Virgil*, 2 W. Rob. 205; *The Lochlibo*, 3 W. Rob. 318; *The W. V. Moses*, 6 Mitch. Mar. Reg. 1553. Where there is a reasonable doubt as to

which party is to blame, the loss must be sustained by the party on whom it has fallen. *The Catherine of Dorer*, 2 Hagg. 154."

Other cases to the effect that an error of judgment on the part of the master of a tug will not make the tug liable, unless the error is so gross that it would not have been made by a master of ordinary prudence and judgment, are:

The E. Luckenbach, 109 Fed. 487, same case
113 Fed. 1017, 51 C. C. A. 589.

The W. E. Gladwish, *The F. B. Thurber* and
The Francis King, 17 Blatchford, 77.

The Czarina, 112 Fed. 541.

The Battler, 72 Fed. 537, 19 C. C. A. 6.

The Wilhelm, 47 Fed. 89.

The Mohawk, 7 Ben. 139.

The Frederick E. Ives, 25 Fed. 447.

The Mosher, 4 Biss. 274.

The Worthington v. The Davis, 19 Fed. 836.

Neel v. Blythe, 42 Fed. 457.

The Sylfid, 169 Fed. 995.

The Olympia, 52 Fed. 985.

The Yacht Clytie, 10 Ben. 588.

The Columbus, 1 Abb. Adm. 384.

It is doubtless true that had the "Thode Fagelund" continued upon the course agreed upon she would have safely passed to starboard of the "Thielbek" and "Ocklahama." Nolan's judgment, therefore, when he first sighted the "Thielbek" and "Ocklahama" was correct; it was equally correct when

he gave the first passing signal; it was equally correct also when he gave the second passing signal. After giving the second passing signal, however, he changed his judgment, and honestly believed that he could not make a starboard passing safely. In this he was in error, as shown by the evidence and as correctly found by the trial court, but this error was not negligence, only an error of judgment, and in his judgment in this particular he is sustained by the testimony of Hansen, the master of the "Thode Fagelund," who also was on the lookout and who sighted the "Thielbek" and "Ocklahama" at the same instant at which these vessels were sighted by Nolan. This witness testifies: (Apostles, page 484.)

"Q. At that time" (witness' attention is called to the position when he first saw the "Thielbek") "and under the circumstances that you have described, what was it that you could have done to have avoided a collision?"

"A. We could not do anything to avoid it. There wasn't anything else to be done."

This testimony is confirmed by his letter to Pilot Nolan dated September 13, 1913 (Apostles, page 878), wherein he says:

"I beg to say that I have no fault whatever to find with you, and approve of what you did at that time while acting as my pilot."

Briefly summing up the contention of The Port of Portland on this subject, it appears that the

"Thode Fagelund" sighted the "Ocklahama" and "Thielbek" at practically the same instant at which the "Ocklahama" sighted the "Thode Fagelund." At that time all the lights of the "Ocklahama" and her tow were in sight of those on the "Thode Fagelund" but only the range lights and the green light of the "Thode Fagelund" were in sight of those on the "Ocklahama." Under these circumstances the proper passing signal should have been one whistle and the vessels should have passed port to port, but at this time the "Thode Fagelund" was above the dredge "Chinook" and it was necessary for her to pass aft of this dredge on a course which would have taken her toward the Astoria shore and directly in the course of the "Ocklahama" and "Thielbek." After passing aft of the "Chinook," in order to pass port to port it would have been necessary for the "Thode Fagelund" to have changed her course entirely and practically almost at right angles, that is to say, though the vessels might have passed port to port, the "Thode Fagelund," to accomplish this passing, would have been in imminent danger of colliding with the dredge at anchor. The passing signal given was therefore correct. The situation had not changed materially at the time the second passing signal was given and answered; but after the second passing signal was given those in charge of the navigation of the "Thode Fagelund" apprehended from what they saw of the "Thielbek" and "Ocklahama" that in order to pass safely to starboard it was nec-

essary for the "Thode Fagelund" to reduce her speed so as to give the "Ocklahama" and "Thielbek" an opportunity to get out of her way. Accordingly, realizing the danger apparently almost as soon as the signals had been exchanged, the "Thode Fagelund" reversed her engines and gave a danger signal, and soon thereafter, in order further to reduce her speed and give more time for the "Ocklahama" and "Thielbek" to change their course according to the signals, the "Thode Fagelund" let go her port anchor and again gave a danger signal. These maneuvers were proper maneuvers if the situation was as believed by the pilot on board the "Thode Fagelund" and by her master, but in reality both the pilot and the master were in error in judging the danger.

It is significant that the orders given by the pilot were directly in conflict with the Rules of Navigation, were known by him to be in conflict therewith, and were so recognized by the master of the "Thode Fagelund." In other words, the situation at the time that they sighted the "Thielbek" and "Ocklahama" was, in the judgment of these experienced mariners, extraordinary, and in their judgment they were "called upon to act in an emergency and had to face perils unexpected." The situation, indeed, when they got a full view of the "Thielbek" and the "Ocklahama," was one of surprise, and in consequence the pilot, acting in good faith and with his best judgment, miscalculated his chance on passing and adopted the course which he should not have adopted, but which other mariners of equal experi-

ence, as for example the master of the "Thode Fagelund," would have adopted under the same circumstances.

Second, the act of negligence imputed to Pilot Nolan by the trial court is that while backing full speed astern he failed to signal this fact to the "Ocklahama" by giving three blasts of his steam whistle. The opinion of the Court does not point out in what particular this act of negligence caused or contributed to the collision. The undisputed evidence in the case is, and it is so found by the Court, that from the time that the first passing signals were exchanged between the two boats the "Ocklahama" changed its course to port and was doing all that it could to aid in the maneuver agreed upon. It could not have done more to have avoided the collision had it known that the "Thode Fagelund" was backing. It is submitted that this act of negligence did not cause or contribute to the collision. Every step taken by the pilot of the "Thode Fagelund" was communicated to the master of the "Thode Fagelund" who was on the bridge in charge of his vessel and in a position to act and to act promptly. He did not see fit to act, indeed he fully endorsed every action taken by the pilot; and this is fully established by his testimony and by his letter in which he says that he has no fault to find with the pilot and approved of what he did at the time while acting as his pilot (*supra*, Apostles, page 878).

It is respectfully submitted that the true cause

of the collision was the position of the "Chinook" in the channel of the river. It is found by the trial court that this dredge was in such a position that vessels approaching from either side of her could not sight one another over her because of her height. At the time when they did sight one another it is probable that the collision could have been avoided only by the "Thode Fagelund" making a starboard passage. This she attempted to do, and in this attempt she was assisted as far as could be by the "Ocklahama" and "Thielbek." It is true that had the "Thode Fagelund" continued upon the course which she was then pursuing the collision would probably have been avoided, and that she could have escaped the collision in no other manner; but after initiating this maneuver both the pilot on the "Thode Fagelund" and the master of this vessel, exercising their best judgment, concluded that the maneuver could not be successfully carried out. They therefore agreed that the only course which could be adopted to avoid the collision was to check the speed of the "Thode Fagelund" as far as possible and, in order to do this, reverse and back full speed astern and throw out an anchor. That they did what they thought they should have done under the circumstances is not denied; that what they did do caused the collision is fully established by the evidence and found by the trial court. The error which they committed therefore and which caused the collision was not due to negligence, and if it

was not due to negligence The Port of Portland should not be responsible.

Limitation of Liability

ASSIGNMENTS I AND II

(APOSTLES, PAGES 131 AND 132; I AND II, APOSTLES, PAGES 257 AND 258.)

ASSIGNMENTS VII, VIII AND IX

(APOSTLES, PAGES 133 AND 134.)

ASSIGNMENTS VII, VIII, IX AND X

(APOSTLES, PAGES 259 AND 260.)

In the answer in this cause The Port of Portland pleaded the law under which it was authorized to carry on the business of towage and pilotage. Exceptions were filed to these portions of the answer and these exceptions were sustained by the trial court. The question was raised again upon the hearing upon the merits. In sustaining the objections and in ruling against the contention of The Port of Portland in this particular the learned judge relied upon the case of *Workman v. New York*, 179 U. S. 552, and in stating his conclusions said:

“If, as held in this case, state laws and decisions cannot exonerate a municipality owning an offending vessel from liability in admiralty for a tort committed by such vessel, it would seem logically to follow that such a law limiting the amount of recovery and thus affecting the relief to be granted is not binding on an admiralty court, where the wrongdoer is subject to the

jurisdiction of such court and the proceeding is in accordance with the maritime law.”

The question involved is one of great importance, not only to The Port, but through it to the people of Portland. The principle to be by this honorable Court’s decision announced will extend far beyond the limits of the case at bar—so far, in fact, that it is not believed this Court will be willing to let it rest on the sole authority of the one case cited, particularly when, as is submitted, a critical examination of the actual *rationes decidendi* of that case will show its authority to be confined within very narrow limits. In fact, the exact questions raised and settled by the *Workman* case do not, it is believed, properly govern the case at bar.

In *Workman v. New York*, 179 U. S. 552, the city of New York was held liable *in personam* for damages occurring in New York harbor due to the negligence of those in charge of a fire boat. The District Court assumed that the law of New York controlled, and *held* that by that law the city was liable. The Circuit Court of Appeals of the Second Circuit (14 C. C. A. 530, 67 Fed. 348) expressly said (Wallace, J., at page 531 of 14 C. C. A.):

“That the suit is brought in a court of admiralty instead of a common law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion.”

The Court then went on to decide that the city, under the New York decisions, was not liable for the negligent handling of its fire boat, being, as regards that particular business, engaged in the exercise of governmental functions.

Mr. Justice White, in stating the opinion of a majority of the Supreme Court (Mr. Chief Justice Fuller, with Justices Harlan, Brown and McKenna), was very careful to lay down the exact questions to be decided:

“We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law shall control; and second, if the case is solely governed by the maritime law, whether the city of New York is liable.”

The issue the learned justice stated thus:

“Does the local law, *if in conflict with the maritime law*, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Art. 3, Sec. 2) upon the courts of the United States?”

This language makes it clear that the Supreme Court intended to hold, and did hold, that *where a local statute conflicts with the maritime law, a court of admiralty, having secured jurisdiction, will*

be governed by the latter, and not the former, in the administration of maritime rights and duties.

Here there is no question of The Port of Portland's escaping all liability on the ground of sovereignty unless held by the general maritime law. On the contrary, The Port has no desire to disclaim liability on any grounds other than those disclosed by the evidence and noted in this brief; but it is insisted that The Port, if adjudged liable in spite of such evidence, cannot and should not be deprived of the protection, namely, the limitation of its liability, afforded by the very law by which it was created and under which it was operated at the time of the collision.

It is very plain that the *Workman* case presented a very different situation. The contention there was summed up by Mr. Justice White as follows:

“Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not because, by the rule prevailing in the state, the wrongdoer is not gen-

erally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions, that the wrongdoer is endowed with all the attributes of sovereignty, and therefore as to injuries by it done to others in the assumed sovereign character, courts are unable to administer justice by affording redress for the wrong inflicted."

The dangers inherent in even the implied acceptance of such a doctrine need no elaboration. They are very forcibly stigmatized farther on in Mr. Justice White's opinion; the two English cases cited by him are said to point out "the evil consequences growing from thus implanting in the maritime law *the doctrine that wrong can be done with impunity*" (italics ours). As stated above, however, *this appellant makes no such claim to immunity from liability*. Therefore the reasoning that led to the *Workman* decision does not apply to the case at bar.

Aside, however, from questions of legal doctrine, the truth of appellant's contention that the *Workman* case was not intended to govern cases like the one at bar becomes more and more evident when the facts surrounding that decision are examined. In the long and exhaustive dissenting opinion, written by Mr. Justice Gray, for himself and Justices Brewer, Shiras, and Peckham, the sole question raised is as to the liability of a municipal corporation for the negligence of its fire department. The

learned Justices, after a very careful review of the authorities, agreed that for such negligence a municipal corporation, being, as to the prevention of fires, in the exercise of a governmental function, could not, in the absence of statute, be held liable; and they concurred with the Circuit Court of Appeals that the fact that the suit lay in admiralty did not affect that conclusion. The matter contained in this dissent shows very plainly what were the two positions taken by the divisions of the Court. The majority considered that the admiralty had the power to grant needed relief which would not, without the exercise of the admiralty jurisdiction, be forthcoming. The minority believed that no such relief should, on principle, be granted, whether it was applied for in admiralty or not. Clearly none of the Justices apprehended that the majority opinion entailed the acceptance of *the astonishing proposition that, where relief was already foreseen and provided for by a local statute, on certain agreed terms, the admiralty, in recognizing the liability for such relief and in confirming the same, should also have power utterly to disregard the terms upon which such relief was originally predicated?*

The second ground for upholding appellant's interpretation of the *Workman* decision proceeds from a critical examination of the cases cited by Mr. Justice White as bearing on this feature of his opinion. And surely here, if anywhere, will be found justification for the application heretofore made—wrongly, as we think—of this case; for, since

none of the language used by Mr. Justice White will bear any interpretation other than that for which appellant contends, no other interpretation can be fathered on the decision, unless the cases quoted by him exhibit a different doctrine.

The first case cited (after the two English cases hereinabove referred to) is that of *Young v. The Key City*, 81 U. S. (14 Wall.) 653, where it was held that in enforcing a lien for breach of a contract of affreightment courts of admiralty are not bound by any particular statute of limitation.

That this decision is merely in accord with the general principles of admiralty, and does not apply to the case at bar, is clearly shown by Mr. Justice Miller's statement of the propositions involved:

"We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities:

"1. That while the courts of admiralty are not governed in such cases by any Statute of Limitation, they adopt the principles that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense.

"2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

“3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.”

There, as in the *Workman* case, the admiralty exercised its power to further the ends of justice, and to prevent the party liable from *escaping all liability by setting up a state statute of limitation*—a very different thing from invoking the admiralty jurisdiction for the purpose of destroying one of the statutory conditions of this appellant’s existence, particularly when such condition, far from purporting to absolve appellant from all liability (as in the *Workman case*), is rather an admission of liability—in the proper circumstances. This admission, being made before the event, is, according to one of the commonest principles of business honesty, made with a reservation. No situation is more common in mercantile transactions, or more universally accepted; yet this Court, sitting in admiralty, is asked to ignore it—and on what grounds? Surely not on the authority of *Young v. The Key City*.

The next case cited is *The Lottawanna, Rodd v. Heartt*, 88 U. S. (21 Wall.) 558. The language used in that case by Mr. Justice Bradley is largely quoted by Mr. Justice White in support of the desirability of

a uniform system of admiralty law; but the precise holding of the case is no more than that a state lien for materials, *not having been perfected under the state law*, could not be enforced in admiralty. By way of *dictum*, it was also held that, even had such lien been perfected under the local statute, the 12th Admiralty Rule, as in force at the time, precluded its enforcement in admiralty. It will be seen that this decision is very far from holding that the admiralty jurisdiction, once having attached, will operate to break down the safeguards and reliefs afforded by the state statutes. Indeed, the tenor of the whole opinion is quite the contrary. Mr. Justice Bradley, having disposed of the case on the first ground as above noted, went on to say:

“Had the lien been perfected, and had the Rule not stood in the way, the principles that have heretofore governed the practice of the district courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material men to file a libel against the vessel or its proceeds. * * * State laws, it is true, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District

Courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent thereto. *But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by state laws*" (italics ours).

The true view of situations such as that presented by the case at bar is very clearly set forth a little later on in the opinion. In fact, it is submitted that in the passage about to be quoted Mr. Justice Bradley has put his finger on the exact distinction governing this appellant's position:

"It would, undoubtedly, be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.

"Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by state laws until Congress interposes, and thereby excludes further state legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation

of State laws. And yet this exercise by the States of the power to regulate pilotage has not withdrawn the subject and, indeed, cannot withdraw it from the admiralty jurisdiction of the district courts."

It is the very subject of pilotage that the state of Oregon has regulated by the statute creating this appellant. Under the doctrine voiced in *Rodd v. Heartt*, the case quoted most at length in the *Workman* decision, *the admiralty court not only has jurisdiction, but is bound to recognize and enforce the Oregon statute.*

In *The Montana, Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, it was held that by the general mercantile law and the fundamental law of common carriers such a carrier cannot stipulate for immunity from the consequences of its own or its servants' negligence, and that therefore the admiralty, having secured jurisdiction, would proceed according to the general mercantile law and not according to the law of New York state. On this point Mr. Justice Gray, speaking for the Court, said:

"It was argued for the appellant that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that State in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence." (Citing authorities.)

“But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State.” (Citing authorities.) “The decisions of the State courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.”

The opinion goes on to make it clear that it is not founded on any general maritime law. Indeed, Mr. Justice Gray expressly states:

“There is not shown to be any such general maritime law.”

The ground for the decision is nothing more nor less than public policy. The Court, having decided that the contract, being made in the United States, should be governed by the law of that country, proceeds to exercise its power *as a Federal Court* to declare what that law is, in spite of contrary decisions in the New York state courts. Mr. Justice Bradley says:

“Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.”

It will readily be seen that this case, no more than the others so far examined, has any bearing upon the one at bar. The Supreme Court of the United States, having jurisdiction, simply disagrees with and overrules the courts of a state on a question of substantive law, thereby affording redress where otherwise none would be. Surely this affords no ground for asking a Federal Court to disregard and nullify a statute of the *locus*, thereby removing safeguards and guaranties which were created and imposed on this appellant, together with concomitant liabilities and duties, by such statute, and which

have consequently been relied upon by this appellant.

Butler v. Boston & S. Steamship Co., 130 U. S. 527, the next case cited by Mr. Justice White, held that the law of limited liability applied to claims for damages due to loss of life as well as loss of cargo. A local statute, fixing certain liabilities on common carriers of passengers for loss of life, was pleaded. After deciding as above, Mr. Justice Bradley said:

“It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question” (*i.e.*, the place of collision).

Obviously no state statute, *where in conflict with the Federal statute*, should control; but again this is not the case at bar.

In the next case cited, *The Max Morris*, 137 U. S. 1, it was held that a libelant's contributory negligence was no bar to his recovery in admiralty, but that the damages should be divided according to the familiar rule. This decision was arrived at on the grounds of general justice, and furnishes another illustration of the fact that *the admiralty courts will use their broad and untrammelled powers to further justice between the parties*—not, as libelants ask this honorable Court to do here, to promote injustice and confusion in the law of business relations. In fact, as noted later on by Mr. Justice White, *The Max Morris* holds that

it was "*the duty of the admiralty courts to grant relief*"—following out the principle suggested in *Rodd v. Heartt* and remarked upon *supra* in this brief. In other words, the sole rule for the guidance of courts of admiralty is that they shall use their somewhat vaguely-defined powers *to prevent miscarriage of justice*. Clearly, then, *The Max Morris* essentially supports the contention of appellant.

The J. E. Rumbell, 148 U. S. 1, next cited, held that liens granted by a state statute and attaching before the recording of a mortgage took precedence of such mortgage, and were enforceable in admiralty. Here, again, the admiralty is found recognizing and enforcing liabilities created by state statutes. The Court, speaking by Mr. Justice Gray, considered it unnecessary to dwell upon the question as to whether the lien so enforced, is a maritime one, though simply imposed by a state statute upon a maritime contract,

"inasmuch as the lien in question is given precedence over mortgages, by the express terms of the statute of Illinois, as well as by the principles of the maritime law and the practice in admiralty."

Mr. Justice Gray quotes at some length from the opinion of Judge Matthews in *The Guiding Star*, 18 Fed. R. 263, where, in enforcing a lien given by a state statute, that Judge said (at page 266) :

"The claims" (i. e. statutory liens arising in home ports, and maritime liens arising in for-

eign ports) "are in their character, both classes being maritime, alike, and of equal merit. The lien is given by the law, and, although the source of one is the maritime law, and that of the other a local statute, nevertheless they are both so distinctively of a maritime nature that they are exclusively cognizable in the admiralty courts.

"The statute which gives a lien to secure the claims of the domestic creditor, does not recognize any such distinction; and the admiralty rule which authorizes its enforcement in the admiralty courts, provides equally for all suits by material men for supplies or repairs or other necessities, without any distinction in consequence of their claims arising in a foreign or home port. In both cases the lien is given by the law administered in admiralty courts, and there is no circumstance, it seems to me, that takes from the local law its equal force and effect with that of the general maritime law. It is because the latter, by virtue of its own principles, recognizes the efficacy of the local statute to confer the lien, that courts of admiralty acquire jurisdiction to enforce it at all; in doing so, they are in fact, enforcing the general maritime law, and that law, in adopting and enforcing the lien given by the local law, incorporates it into its own system, and puts it on the same footing as if it had been given by the maritime law originally."

It seems obvious that no such language as that used in *The J. E. Rumbell* or *The Guiding Star* would have been used or approved by the Supreme Court had that body for one moment imagined that such use and approval would subsequently be made the basis of a later decision (the *Workman* case), which later decision should thereafter be interpreted in such a manner as utterly to controvert and nullify the original reasoning of the Supreme Court and of Judge Matthews. *The J. E. Rumbell* and *The Guiding Star* simply supply fresh proof of this appellant's contention — namely, that neither the cases on which Mr. Justice White rested the *Workman* decision, nor that decision itself, cover or were intended to cover cases such as the instant one.

The last case cited by Mr. Justice White in support of the particular point under discussion is *The Albert Dumois*, 177 U. S. 240, where it was held that claims for damages arising out of loss of life in a collision were valid under the limited liability act. There was a local statute giving privileges to certain kinds of claims, but the Court, after consideration, decided that such statute did not govern death-claims, and therefore could not apply. *Butler v. Boston & S. Steamship Co.* was followed. In the *Workman* case Mr. Justice White, after citing *The Albert Dumois*, very properly remarked that

“such cases afford no foundation for the proposition that state laws or decisions can deprive

an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed * * *,

but neither do such cases afford a foundation for the proposition that the maritime law can be taken advantage of to deprive an individual (or a corporation) of rights and safeguards granted by the laws of its parent state, especially when no risk of miscarriage of justice or question of public policy is involved.

This somewhat lengthy examination of the principles underlying so much of the *Workman* case as affects the case at bar has, it is hoped, not been fruitless. Even aside from the strict limits laid down by Mr. Justice White himself for the application and operation of the decision announced by him, a scrutiny of the authorities therein approved and relied upon conclusively shows that *the Workman* case, far from imposing on courts of admiralty an obligation to override local statutes, simply affirmed not only their power to grant relief where local decisions would refuse it, but also their duty to recognize and enforce local statutes when these latter afford protection not provided by the general maritime law. In other words, the *Workman* case, accurately considered, simply reaffirms the general principle of admiralty jurisdiction which this appellant invokes, through this honorable Court, to validate the conditions under which all parties to this

suit were operating at the time of the collision (and without which, indeed, this appellant could not by law act at all), in order that justice, and not injustice, may be done. *By the terms of the Workman case this Court, sitting in admiralty, has both the power and the duty to do as this appellant requests; and by these same terms this Court has neither the duty nor the power to ignore and sweep away the rights and liabilities imposed by the statute.*

TRUE NATURE OF THIS SUIT.

This suit, in form personal, as for a tort, is brought against The Port of Portland for acts committed by its servants in the course of the pilotage and towing business. The Port of Portland is, of course, quite unauthorized to engage in any such business *apart from the statute*. Apart from the statute, therefore, no suit such as the one under consideration could be brought. Consequently it will be seen that not only the authority of The Port of Portland to tow and pilot vessels, but also its liability to respond in damages for its acts or those of its servants in the exercise of such authority, depends solely upon the statute. The statute being a matter of public origin and record, it is elementary that all persons taking advantage of it are charged with notice of its provisions. Clearly, therefore, this suit, though in form sounding in tort, is based upon a contract—the terms of the statute creating both The Port's duties and its liabilities—without which no tort would be possible. Such

being the case, the provisions of the statute should be looked to and carefully respected in enforcing any liabilities owing their existence solely to such statute. Here the liability, in certain situations, is limited to a certain sum.

It is familiar law that liability may be limited by contract, even when one of the parties is a common carrier. Such limitation is generally accomplished in one of two ways. The most common is that of a stipulation in a contract (generally a bill of lading) against liability for loss or damage arising from particularly enumerated causes. Such cases are:

Burroughs v. N. & W. R. R. Co., 100 Mass. 26,
where a freight tariff exempting the carrier from liability for "collisions," etc., was held to bar suit;

Adams Expr. Co. v. Fendrick, 38 Ind. 150,
—express company held not liable for explosion on steamboat, stipulated against as "damages of river navigation";

Wolff v. The Vaterland, 18 Fed. 733,
—stipulation in bill of lading against rust held valid;

The New Orleans, 26 Fed. 44,
—stipulation in bill of lading against heat held valid;

The Alesia, 35 Fed. 531,

—stipulation in bill of lading against frost held valid;

Constable v. Nat. S. S. Co., 154 U. S. 51,

affirming

Arnold v. Nat. S. S. Co., 29 Fed. 184,

—stipulation in bill of lading against fire after discharge of goods held valid;

The Henry B. Hyde, 90 Fed. 114,

affirming

The Henry B. Hyde, 82 Fed. 681,

and

The Lennox, 90 Fed. 308,

in both of which cases a stipulation against loss by breakage was held valid;

The Prussia, 93 Fed. 837,

—stipulation against latent defects in refrigerating apparatus held valid;

The La Kroma, 138 Fed. 936,

—proviso in bill of lading “not responsible for weight,” held to exempt ship from such liability;

The Niceto, 134 Fed. 655,

—stipulation in bill of lading against damage by nature of goods held valid;

The Claverburn, 147 Fed. 850,

—stipulation in bill of lading against loss by leakage held valid.

See also 36 Cyc. 287-289.

The other common mode of limiting liability by contract is to stipulate that claims for loss or damage will expire unless presented within a certain time. Among the many such cases a few will suffice for illustration:

The Southern Express Co. v. Caldwell, 88 U. S. (21 Wall.) 264,

where a provision that no liability should attach as against the express company unless claim were made within ninety days of the loss, etc., was upheld, both on principle and on authority, by the Supreme Court. Mr. Justice Strong, speaking for the Court, refers to similar limitations of liability on the part of telegraph companies—a line of authority purposely omitted, rather than swell this brief to unnecessary proportions;

Angel v. Cunard S. S. Co., 55 Fed. 1005,

—stipulation that claim be made before removal of goods held binding;

Ginn v. Ogdensburg T. Co., 85 Fed. 985,

—stipulation in bill of lading that claim be made within three months held valid;

The Naranja, 104 Fed. 160,

—stipulation that claim be made inside of twenty-four hours held valid;

The Arctic Bird, 109 Fed. 167,

—stipulation for presentment of claim within ten days held valid;

The Queen of the Pacific, 180 U. S. 49.

reversing

Pac. Coast S. S. Co. v. Bancroft-Whitney Co.,
94 Fed. 180,

—stipulation in bill of lading that claim be presented within thirty days held valid.

See also 36 Cyc. 288-289.

That the English law is the same appears from *Maclachlan, Law of Merchant Shipping* (5th ed.), where it is said (at page 613):

“We have seen that the exceptions in the contract do not protect the shipowner against claims for loss or damages due to the excepted causes, when brought about by the negligence of himself or his servants; but that he may protect himself against the operation of this rule by stipulating expressly and unambiguously, that he will not be responsible for such negligence. Clauses having that object are not common, but they vary greatly in their language.”

The power to limit liability, therefore, by agreement of the parties, is unquestioned in admiralty. It is equally well settled that where a state statute creates rights and liabilities unknown to the general maritime law the admiralty courts will recognize and enforce such rights and liabilities. A few cases will serve as examples:

In re Humboldt L. Mfrs. Assn., 60 Fed. 428;
The Willamette, 70 Fed. 874,

affirming

The Premier, 59 Fed. 797;
The Glendale, 77 Fed. 907;
The Jane Grey, 95 Fed. 693;
Middleton v. La Compagnie, etc., 100 Fed. 866,

—all cases where a local statute giving a personal representative a right of action for death of decedent was held valid and enforceable in admiralty;

The Northern Queen, 117 Fed. 906,

—state statute giving representative a right of action held valid in limited liability proceedings;

In re Clyde S. S. Co., 134 Fed. 99,

—Delaware statute held valid in admiralty;

The Hamilton,
Old Dominion S. S. Co. v. Gilmore, 207 U. S.,
 398,

—Delaware statute held enforceable in limited liability proceedings;

La Bourgogne,

Deslions v. La Compagnie, etc., 210 U. S. 95,

—law of France giving right of action for death held enforceable in limited liability proceedings in the United States;

Monongahela R. C. C. & C. Co. v. Schinnerer,

196 Fed. 375,

—Arkansas statute concerning contributory negligence held valid, not the usual admiralty rule.

Moreover, it has again and again been expressly held that *where a state statute creates rights and liabilities, such rights must be secured and such liabilities enforced strictly according to the terms of such statute, and not otherwise*. One of the earliest cases on this point, and one very frequently cited in the books, is that of *The Red Wing*, 14 Fed. 869, where an action in admiralty to enforce a lien for supplies under the local statute was held barred by the expiration of the time set by the statute within which such action must be begun. The principle was recognized by the Supreme Court as early as 1886, in *The Harrisburg v. Rickards*, 119 U.S. 199, which will be noticed more fully later in this brief. Other cases recognizing the rule (it is no less) are:

The A. W. Thompson, 39 Fed. 115,

—in action for death under state statute, contributory negligence which would be a bar in that state, held a bar in admiralty as well;

Madden v. Lancaster County, 65 Fed. 188,

—limitation in state statute giving right of action for defective bridges, etc., against the county that such action be brought within thirty days of the injury held valid;

Savings & Trust Co. v. Bear Valley Irr. Co.,
89 Fed. 38,

—approving *The Harrisburg v. Rickards*, *supra*, to the extent that a time-limit imposed by statute on a right of action granted by such statute is valid;

The Schooner Robert Lewers v. Kekaouha,
114 Fed. 851,

—upholding Hawaiian decision to the effect that, under the Hawaiian statute providing for the future modification of the common law by the Hawaiian courts, a judgment in such courts giving a widow a right of action in admiralty for her husband's death was valid and binding in admiralty;

Williams v. Quebec S. S. Co., 126 Fed. 591,
and

International Nav. Co. v. Lindstrom, 123 Fed.
475,

—both holding valid time-limits on actions given by statute for death at sea;

The Edna, 185 Fed. 206,

—time-limit, under state statute, for setting up

state lien for supplies upheld as binding in admiralty;

Partee v. St. L. & S. F. R. Co., 204 Fed. 970,
—statutory action for death held barred in Federal Courts by state two-year limitation;

Thompson T. & W. Ass'n. v. McGregor, 207 Fed. 209,
—Michigan statute held operative in admiralty to keep alive widow's claim for death of husband in Canadian waters, though claim barred by law of Canada.

Any liability that might be attached to The Port of Portland in this suit, being founded on the statute creating The Port of Portland, *must necessarily be enforced according to the requirements of that statute and not otherwise*. That this is the settled doctrine of the courts of admiralty in the United States appears not only from the cases noted *supra*, but also even more clearly from the language used by the judges themselves. In *The Edith, Poole v. Tyler*, 94 U. S. (4 Otto) 518, it was said by Mr. Justice Strong, speaking for the Court:

“It is almost superfluous to remark, that whatever lien the appellants ever had, they held it subject to all the provisions of the statute which gave it to them. * * * Clearly the State had power to enact that the lien it created should terminate, if a bond was given in place of the vessel; and the creditor claiming the lien

must take it, subject to the conditions imposed."

In *The Harrisburg v. Rickards*, cited *supra*, the leading case on this point, although the decision of the actual questions presented did not necessarily involve the principle for which we quote it and for which the cases rely upon it, Mr. Chief Justice Waite used the following language:

"The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute, as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

The reasoning of this case was followed out and

applied with characteristic acumen by Judge Brown in

The City of Norwalk, 55 Fed. 98,

where, in holding valid a state statute giving a right of action for death at sea, the learned Judge said (at p. 112) :

“From that decision” (i. e., *The Harrisburg v. Rickards*) “it necessarily follows, that within the sphere in which the municipal law is valid and operative, viz. within the navigable waters of the state, the state law, in the absence of any act of Congress, as to the survival of any such right of action, or any distinctively maritime rule applicable to the case, must furnish the rule of law as to the right of recovery.”

This case was affirmed in *The Transfer No. 4 and The Car Float No. 16*, 61 Fed. 364, as far as concerns Judge Brown’s opinion on this point, although the decree was modified in another particular.

In *Woodward, Wight & Co. v. Dillworth*, 75 Fed. 415, in holding that certain voluntary proceedings, unknown to the state law, resulting in a sheriff’s sale of a vessel, did not divest a lien on her for supplies under the state law, Circuit Judge Pardee, previously to citing authorities, including *The Harrisburg v. Rickard*, said (p. 418) :

“We think there can be no doubt that the lien granted by the local law must be taken

with all the limitations and conditions attached by the lawmakers. This has been specifically held in numerous cases in the United States courts, and from an early day."

Similarly in *Stern v. La Compagnie, etc.*, 110 Fed. 996, Judge Brown said (at p. 1000) :

"But this is * * * a purely statutory action *in personam*, and hence must be governed by the provisions of the statute on which the action rests."

Words more precisely applicable to the instant case could hardly be found; and the rule by which all admiralty courts of the United States should be governed was recently very crisply stated by the Circuit Court of Appeals for the Fifth Circuit in *Quinette v. Bisso*, 136 Fed. 825, where in giving damages for death caused by a river collision under the Louisiana statute, *and in following the analogy of the Louisiana decisions in fixing the amount of such damages*, Judge Jones said (at p. 838) :

"The statute must be applied in admiralty just as if the suit had been brought in the state courts." (Italics ours.)

The principles laid down by the courts as quoted *supra* have been recognized and enforced by the District Court of Oregon, sitting in admiralty, for over thirty-five years. As early as 1887, in the case of *The City of Salem*, 31 Fed. 616, Judge Deady, in holding that a bank's lien, if any, on a vessel

for repairs, attaching (if at all) under the Oregon statute, was barred by the Oregon statute of limitations, said (at p. 619) :

“In enforcing liens on vessels given by state statute, courts of admiralty do so subject to every qualification and limitation attached to them by such statutes.”

Again in *Holland v. Brown*, 35 Fed. 43, the same eminent Judge, in giving effect in admiralty to an Oregon statute granting a personal representative a right of action for death and limiting the recovery to \$5000, said (at p. 47) :

“Although this suit was brought on the theory that this court might have jurisdiction of the wrong complained of, without the aid of any statute of congress or the state, and therefore the damages were only limited by the judgment of the court, yet on the hearing it was admitted, on the authority of the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, that the right to damages at all was derived from the statute of the state, which limits the amount to \$5,000, and therefore the claim in the libel for \$10,000 damages was abandoned.”

This ruling was followed in *The S. S. Oregon*, 42 Fed. 78, and in *The Oregon*, 45 Fed. 62, both cases arising out of the same accident, and both decided by Judge Deady. The decree in *The Oregon* was reversed on appeal in *The Oregon*, 158 U. S. 186, and modified accordingly in *The Oregon*,

73 Fed. 846, which in turn was reversed (on a pure question of admiralty practice—i. e., what constitutes commencement of suit) in *Laidlaw v. Oregon R. & N. Co.*, 81 Fed. 876, but in none of the various courts through which the case passed under different forms is there any suggestion of repudiation of Judge Deady's holding concerning the force of the Oregon statute. The opinion on remand in 73 Fed. 846, indeed, puts the Oregon District in line with the others in which the local statute of limitations is considered a bar in admiralty (cases cited *supra*); and although reversed on appeal, there is no intimation by the Appellate Court that the Oregon limitation would not have held good had the statute begun running, which the Appellate Court did not think it had. On the contrary, Judge Ross expressly said (at p. 879 of 81 Fed.) :

“The local law giving the lien, however, conditions the right upon the commencement of the action within two years after the death. Time has thus been made ‘of the essence of the right, and the right is lost if the time is disregarded.’ The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140. Has it been disregarded in the present case? is the question to be decided upon the merits. That depends upon what constitutes the commencement of the libelant's suit. If the filing of his petition of intervention, which, by the order of the court, is permitted to stand as his independent libel, con-

stitutes such commencement, he is, of course, in time, for that was filed within two months after the collision which caused the death of the libelant's intestates. If, however, the time of the seizure of the Oregon under the petition of intervention, treated as an independent libel, is to be taken as the time of the commencement of the suit, then the libelant is clearly barred."

Later still, in *The Aurora*, 163 Fed. 633, Judge Wolverton, in the course of his opinion, said (at p. 635) :

"The adjudications seem to be in accord that, while there is a municipal or local statute authorizing the survivor to sue in the right of the deceased, the action being founded upon negligence causing death, libel *in personam* will lie in admiralty and this whether the title to the chose in action survives, or a new right to sue is given for damages resulting in a tort."

And both the decisions in *The Oregon* and that in *The Aurora* were approved by Judge Wolverton in *The General Foy*, 175 Fed. 590.

It is submitted that it sufficiently appears, to use Judge Wolverton's language in *The Aurora*, *supra* (at p. 636) that:

"*Epecially have the local statutes been given full force in admiralty in this jurisdiction.*" (Italics ours.)

It follows that, if any liability whatsoever attaches

to The Port of Portland in this suit, the limitations set by the statute must be recognized and observed.

RESULTS OF CONTRARY VIEW.

Keeping in mind the distinctions made and the principles established by the foregoing authorities, the confusion caused by the somewhat indiscriminate citation of the *Workman* case may be cleared up. Resting, as it does, merely on the broad principle that, where a tort has been committed on which a suit may be brought under the general maritime law, no local statute may operate to bar such suit, *Workman v. New York* clearly has no bearing upon a case in which, as in the one at bar, no right of action or suit could exist except by operation of the local statute. Any attempt, therefore, to make the reasoning underlying the *Workman* case fit the circumstances of the case at bar can have but one result,—namely, the subversion of the great principles, both of common law and of admiralty, illustrated by the long line of authorities indicated *supra*. In other words, no ruling can be made in the instant case, based upon the decision in *Workman v. New York*, which will not at the same time involve a denial both of the well recognized principle that liability may be limited by agreement between the parties and also of the long established rule under which courts of admiralty must not only recognize local statutes conferring rights foreign to the general maritime law but must also enforce all the terms and pro-

visions of such statutes. (It is, of course, obvious that the fundamental doctrine which prohibits a common carrier from limiting its liability for its own negligence, or that of its servants, has no application here, as it is not and cannot be claimed that The Port of Portland is a common carrier.)

It is submitted that the above considerations sufficiently establish the contention that not only has the *Workman* case no application to the case at bar, but that on both principle and authority this appellant's liability, if any, is limited by the statute, as well in the admiralty jurisdiction as in the courts of this state. Very little speculation, however, is needed to show the disastrous results that might follow an acceptance of any other view. Ever since Judge Story's long and brilliant opinion in the case of *De Lorio v. Boit*, 2 Gallison, 398, the jurisdiction of admiralty over maritime contracts has been unquestioned. What are maritime contracts was thus defined by Judge Story (at pp. 474-475) :

"The next inquiry is, what are properly to be deemed 'maritime contracts'? Happily in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners

of ships; contracts and *quasi* contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, *policies of insurance*. And in point of fact the admiralty courts of other foreign countries have exercised jurisdiction over policies of insurance, as maritime contracts; and a similar claim has been uniformly asserted on the part of the admiralty of England. There is no more reason, why the admiralty should have cognizance of bottomry instruments, as maritime contracts, than of policies of insurance. Both are executed on land, and both intrinsically respect maritime risks, injuries and losses."

Under this definition it is very easy to think of contracts which would both be maritime and at the same time would be governed by the principles as to limitation of liability which govern contracts on land,—for example, a case of limitation of liability by contract between the sender of a wireless telegraphic message concerning general average, and the wireless telegraph company. Plainly, if the doctrine of the *Workman* case is to be applied to such a situation, and the limitation contracted for disregarded on no other ground than that the admiralty law is bound by no limitation not recognized by the general maritime law, the result would be simply confusion and injustice,—the two results which the *Workman* decision was intended to obviate. Similar cases might be

put indefinitely, but the one example will suffice for them all.

It is submitted that from the foregoing but one conclusion is possible: not only is this Court not bound by the *Workman* case, it having no application to the questions here in issue, but, if any liability be held to attach to The Port of Portland, then such liability must be enforced according to and as required by the provisions of the Oregon statute.

Further illustration is supplied by two admiralty doctrines which will be briefly referred to.

In the case of *The John McCracken*, *The Columbia*, 145 Fed. 705, Judge Wolverton held that vessels belonging to The Port of Portland, and used by it in the performance of its public functions of improving and maintaining navigation, are not subject to seizure in a proceeding by libel *in rem* against them. The language used by Judge Wolverton (at p. 708) is as follows:

“The port of Portland was exercising its powers, within the limits of its jurisdiction, according to the legislation of the state; and the vessels in question being the property of the municipality, employed in the public use and necessary to the purposes to which they were being devoted, I am led to the conclusion that the principle of law first herein announced is applicable, and that such vessels are not sub-

ject to seizure at the hands of the government, in a proceeding by libel *in rem* against them."

This case was approved by the same Judge in the District of Oregon in *The George W. Elder*, 159 Fed. 1005.

No elaboration of argument or citation is needed to show that in *The John McCracken* and the many similar cases decided by the admiralty courts throughout the United States local statutes creating certain rights, liabilities, and consequent immunities are recognized and upheld, in strictness of letter and spirit, by the admiralty jurisdiction. The foundation in principle for this doctrine of admiralty is the same as that upon which such local statutes are based,—namely, the soundest kind of public policy.

Statutes limiting the liability of public corporations and of municipal corporations not of this class which are engaged in governmental functions are found upon the statute books of nearly all the states.

In the case of *Pullen v. the City of Eugene*, 146 Pac. 822, a statute of this character (quoted on page 824) was considered by the Supreme Court of Oregon, and the validity of the statute and of the limitation was sustained. This case was again before the Supreme Court of Oregon upon rehearing and rehearing was denied (147 Pac. R. 768). The same case was again before the Supreme Court on a motion to recall the mandate (151 Pac. 474).

In *Humphrey v. the City of Portland*, 154 Pac. 897, a provision of the charter of the city of Portland declaring that the city should not be liable for injuries received from unsafe sidewalks, but imposing the duty to keep sidewalks in repair and liability for injuries from defects on the abutting owner, and providing methods for enforcement of repair of sidewalks by city officials, was under consideration by the Supreme Court. In this case it was held that the charter provision was valid and that the city was not liable. The Court held that the duty of keeping the sidewalk in repair was a governmental duty enjoined upon the city for the benefit of the public in general, and that in failing to discharge that obligation the city engineer omitted the performance of the governmental duty, but that the city was not liable for damages resulting from the injury.

A full discussion of the text writers and decisions upon this subject is contained in this decision.

It will be noted that the validity of acts of this character limiting the liability of municipal and public corporations for damages sustained by reason of negligence or nonfeasance is sustained upon the ground of public policy and upon the further ground that the party injured has his remedy by action against the person through whose negligence or nonfeasance the injury resulted.

The laws of Oregon providing for the licensing of pilots, 2 L. O. L., Section 5156 and following, not

only leave a remedy against the pilot for his negligence, but also require of him a bond payable to the state of Oregon for the use of whom it may concern, thus in effect providing an additional remedy for the person injured through the negligence of the pilot.

Amendment of the Libel of Wilhelm Wilhelmsen

ASSIGNMENTS VII AND VIII

(APOSTLES, PAGES 133 AND 134.)

ASSIGNMENTS VIII, IX AND X

(APOSTLES, PAGES 259 AND 260.)

In Article X of Wilhelmsen's libel there are alleged various acts of negligence on the part of the "Thielbek" and "Ocklahama" and of their officers. These allegations are divided into twelve paragraphs; but *nowhere in the libel is any negligence attributed to the "Thode Fagelund" or her pilot.* On the contrary, in Article XI it is somewhat lengthily alleged that *nothing could have been done by the "Thode Fagelund" "between the instant when the imminent danger of collision was first perceived * * * and between that instant and when the actual impact occurred" to avoid the collision.*

In this connection it is instructive to note also that the allegations of Wilhelm Wilhelmsen in the suit numbered 6116, in which Wilhelm Wilhelmsen is respondent, in his answer to the libel of Knohr & Burchard, Nfl., are even more emphatic in denying negligence on the part of the "Thode Fagelund."

At the end of Article VI of such answer, after a minutely detailed series of averments and denials concerning the navigation of the vessels and their collision, occurs the following language:

“* * * and so, without further answering, respondent says that the circumstances and occurrences propounded in said Article VI” (i. e. Article VI of the libel of Knohr & Burchard, Nfl., which this Article VI of Wilhelm Wilhelmsen’s answer is designed to meet) “did not occur or come about by anything that was done by the ‘Thode Fagelund.’”

Article IX of said answer *denies* “each and every matter and thing propounded” in Article IX of Knohr & Burchard’s libel, the contents of which will be found to contain nothing but allegations of negligence on the part of the “Thode Fagelund.”

Article XII

“Denies that the collision was caused by the fault of the ‘Thode Fagelund’ as in said libel in anywise propounded.”

At the end of Article XVIII it is alleged that

“The said pilot of the ‘Ocklahoma’ and those on the ‘Thielbek’ * * * should not now be heard or allowed to say, nor should The Port of Portland be now heard or allowed to say, *that the ‘Thode Fagelund’ did or committed anything or omitted or failed to do anything at the time of the collision or immediately prior*

thereto which caused or contributed to the same, for that anything the 'Thode Fagelund' did or could have done would not have prevented said collision, and if the 'Thode Fagelund' had omitted to do the things she did do it would not have prevented the collision, but the same and the cause thereof is solely and only due to the failures and omissions of the 'Ocklahoma' and the 'Thielbek' as in this answer and in the libel at first instance propounded, reference being had to Rule XI and Article 27 of the Pilot and Sailing Rules approved by the Acts of Congress."

If, according to this libelant's view, neither the "Thielbek" nor The Port of Portland should be allowed to accuse the "Thode Fagelund" of negligence, it is difficult to see how the "Thode Fagelund's" owner should be allowed to do so.

THE AUTHORITIES.

In the belief that the attempt on the part of Wilhelm Wilhelmsen to escape the consequences of an adverse decision by turning the rules of admiralty practice, and indeed of all legal procedure, inside out is too plainly opposed to the spirit of the law to require contradiction, it is not considered necessary to make any lengthy citation of authority. It is undoubted that the matter lies largely in the discretion of the court; but the following cases are conclusive to the effect that the court's discretion, in

cases of this kind, can lie in only one direction,—namely, the refusal of the proffered “amendments”:

1 Cyc., 859, 860;

Benedict, *Admiralty*, Sec. 413, p. 281 (4th ed.);

McCarthy v. Eggers and Janssen, 10 Benedict, 688,

particularly the remarks of Judge Benedict on page 692, line 11 and following;

The Corozal, 19 Fed. 655,

where Judge Billings, speaking of the twenty-fourth Admiralty Rule, said (at p. 656):

“The meaning was not to abrogate or qualify the universal rule of pleading * * * that ‘amendments are, however, always limited by due consideration of the rights of the opposite party; and where, by the amendment he would be prejudiced, it is not allowed.’ In the system of pleading in admiralty, the rules of the common-law courts, so far as they are technical, are relaxed, but so far as they are founded upon justice between the parties, are unabated * * *”;

New Haven Steam-Boat Co. v. The Mayor, etc., 36 Fed. 716,

particularly the language of Judge Brown beginning four lines from the bottom of page 718;

The Horace B. Parker, 74 Fed. 640,

--a brief but decisive condemnation by the court of just such an application as libelant makes here;

The Habil, 100 Fed. 120,

in which see Judge Toulmin's opinion, beginning at the first paragraph on page 123;

Brennan v. Peter Hagan & Co., 147 Fed. 290,

where an application to amend by alleging negligence not previously alleged was refused when the case came on for argument, on the ground that the facts relied on in the amendment were known to the applicants when they filed their original pleadings; *a fortiori* the court would have refused such an amendment, and should have done so, *if, as in the case at bar, such amendment had not been offered until after decision and judgment on the whole case;*

The Ask, 156 Fed. 678,

in which see particularly Judge Hough's opinion on the motion to amend the libel, on page 681 and beginning at line 26 of page 682;

The Wildenfels, 161 Fed. 864,

especially that part of Judge Coxe's opinion beginning at line 23 on page 865; and

The Bencliff, 161 Fed. 909,

—the last paragraph of Judge Buffington's opinion, on page 911.

In the case of *The Thomas Melville*, 31 Fed. 486, Judge Brown has summed up the law on situations of this character as follows (p. 488):

“In admiralty causes, where testimony is taken upon all the merits of the case without objection, and no surprise or injury can result to either party, the pleadings will be deemed conformed to the proofs. See *The Maryland*, 19 Fed. Rep. 551, 557, and cases there cited. And so also, where the libel contains only a general charge of negligence, and the parties go to trial without any other specification of the kind of negligence, assent to proof of any kind of negligence may be inferred. But as the respondent would be entitled, on demand, to have the particulars of negligence specified, so, *where the libel in connection with an averment of negligence in general, sets forth the particular kind of negligence for which the claim is made, the issue must be deemed limited to those particulars as much so as if a bill of particulars had been served on demand. To permit an amendment by averring substantially a new cause of damage at the trial, where reasonable objection appears, cannot be allowed. As a rule, it would be unjust and impolitic.*”

See also the words of the same admiralty authority in *Burrill v. Crossman*, 65 Fed. 104, on the motion to amend the libel (last paragraph of the opinion on page 111).

The principle to be deduced from these cases is that amendments of the libel in the interest of justice may be and should be permitted in the discretion of the court, provided that a party shall not be allowed so to amend his libel as entirely to abandon the allegations of the original libel and to substitute for the same an entirely new cause of action. The amount of the damages may be amended in such manner that the libelant may claim a larger sum for the same injury alleged in the libel. He may indeed introduce by amendment an additional item of damage or factor of damage and he may recover one-half his damages where he fails to show that the entire fault was with the libeled ship or the opposite party. In all these cases, however, he does not abandon his original cause of action, but recovers upon the allegations of such original libel.

In *Brennan v. Peter Hagan & Co., supra*, the court refused to allow an amendment to the answer upon the ground that the respondents must have had knowledge of the facts relied on in the proposed amendment and should have made their complete defense at an earlier stage of the cause.

In *McCarthy v. Eggers and Janssen, supra*, the District Court refused to allow the defendant to amend his answer and set up that he was a mortgagee out of possession, because he pleaded ownership and set up an agreement consistent only with ownership and failed to prove this upon the trial.

In *The Horace B. Parker, supra*, the court denied the application to amend, saying "the allegations sought to be amended were formed with such deliberation as they now stand, that at the hearing of the cause in this Court they were insisted on by the petitioners both orally and in their brief. There is no equity in the application."

In *The Habil, supra*, at page 123, the District Court says, "*in no case should an amendment be allowed on the hearing which would change the entire cause of action.*"

Again in *The Ask, supra*, a motion to amend the libel was made after the testimony was closed and the case submitted and argued, but seemingly before the decision was rendered. The court (Hough, District Judge), says "amendments in matters of substance should not be allowed on the hearing unless the justice of the case requires it and then to conform to the brief; *and in no case should an amendment be allowed on the hearing which would change the entire cause of action.*"

Applying the principle of these cases to the case at bar, it was clearly error by the trial court to allow the amendment. On the trial the libelant, Wilhelm Wilhelmsen, based his entire cause of action upon negligence in the navigation of the "Thielbek" and "Ocklahama," and negatived most positively any negligence in the navigation of the "Thode Fagelund" or on the part of its pilot. He sought to recover damages which he should have

sustained by reason of the alleged negligence in the navigation of the "Thielbek" and the tow-boat "Ocklahama," and predicated his right to recover against The Port of Portland upon the specification of negligence and of the kind of negligence. In other words, his entire case was predicated upon the particular negligence alleged in the libel. To allow him, therefore, to amend his libel by alleging that the damages were due to the negligence of the pilot in charge of the "Thode Fagelund" is to allow him to change his cause of action entirely. Such amendments are not in consonance with justice or equity. If they are to be permitted, pleadings in admiralty are entirely unnecessary, and the admiralty rules which entitle either party to require an answer or oath to interrogatories propounded touching all and singular the allegations in the libel, or any matters charged in the libel, or touching any matter of defense set up in the answer, are wholly without effect.

Summary

The Port of Portland respectfully submits that there is error in the record as assigned, and that The Port should not be held liable for the damages resulting from the collision between the "Thode Fagelund" and the "Thielbek" in any sum whatever; but, if it should be held liable at all, that it should be held liable to the owners of the "Thielbek" only for the full amount of the damage to that vessel, and to the owner of the "Thode Fagelund" only for

ten thousand dollars, the amount of the limitation contained in the statute under which Pilot Nolan was acting as agent for The Port of Portland. The Port submits moreover, that, if it should be found liable to the "Thielbek," it is entirely on account of the negligence of the pilot upon the "Thode Fagelund," such damage under the findings of fact resulting entirely from the negligence of the pilot on the "Thode Fagelund," and the limitation would apply to this damage as well as to the damages sustained by the "Thode Fagelund" itself. If, therefore, the "Thode Fagelund" should pay the amount of damages sustained by the "Thielbek," the amount so paid would be damage resulting from the negligence of the pilot on the "Thode Fagelund," and it would be entitled to recover of this amount only the sum of ten thousand dollars.

TEAL, MINOR & WINFREE and
ROGERS MAC VEAGH,

*Proctors for Appellant,
The Port of Portland.*

IN THE
**United States Circuit Court
 of Appeals**
FOR THE NINTH CIRCUIT

No. 2769

Docket No. 11

THE PORT OF PORTLAND, a municipal corporation,

vs.

WILHELM WILHELMSSEN, owner, etc., and THE
 PORT OF PORTLAND, etc.,

vs.

KNOHR & BURCHARD, etc., et al., and WILHELM
 WILHELMSSEN,

Claimant,

vs.

KNOHR & BURCHARD, etc., et al.

**MOTION TO DISMISS APPEAL AND
 BRIEF IN SUPPORT OF THE MOTION.
 BRIEF ON THE MERITS**

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD

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IN THE

United States Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

THE PORT OF PORTLAND,
a municipal corporation,

vs.

WILHELM WILHELMSSEN,
owner, etc., and THE PORT
OF PORTLAND, etc.,

vs.

KNOHR & BURCHARD, etc.,
et al., and WILHELM WIL-
HELMSSEN,

Claimant,

vs.

KNOHR & BURCHARD, etc.,
et al.

No. 2769

Docket No. 11

**MOTION TO
DISMISS APPEAL**

in cause No. 6111 entitled
Wilhelm Wilhelmsen, libel-
ant and appellee, vs. the
bark "Thielbek," Knohr
& Burchard, Nfl., claimants
and appellants, The Port of
Portland, respondent and
appellant. **AND BRIEF IN
SUPPORT OF THE MO-
TION.**

Wilhelm Wilhelmsen, the above named ap-
pellee, comes now into this Court, by his proctor,
and questions the jurisdiction of this Court upon
appeal in said cause No. 6111 above described
and for causes and reasons in the record appear-
ing and hereinafter set forth moves to dismiss

said appeal of The Port of Portland in said cause, to-wit:—

FIRST:

That said attempted appeal was prematurely taken for that all of the proceedings in said cause 6111 between all of the parties thereto had not been terminated before February 7, 1916, long after said appeal was attempted to have been taken.

(Record Vol. 1, pp. 129; 136; 145, 6.)

SECOND:

That said decree appealed from was not and is not a final decree for that it lacked the requisite finality as to all of the parties to the record in two particulars: In the determination of the matters with reference to Knohr & Burchard, claimants and owners, and with reference to the subject of costs as between all of the parties.

(Same record references.)

THIRD:

That no appeal has been taken from a final decree after final action as to all of the parties by the Court below so as to give this Court jurisdiction to hear all of the matters determined below.

FOURTH:

That as to said attempted appeal there is not any specification of errors in the brief support-

ing said pretended appeal as required by Rule 24 of this Court and from which this Court and counsel can determine what of right ought to be heard upon said attempted appeal.

WILLIAM C. BRISTOL,

Proctor for Wilhelm Wilhelmsen.

May 4, 1916.

POINTS AND AUTHORITIES SUPPORTING THE MOTION TO DISMISS APPEAL

By the judicial code, section 102, the terms of the District Court in Oregon commence and end on the respective first Mondays of March, July and November.

The decree in cause 6116 was rendered and entered the 24th of June, 1915 (*March term.*)

(Record Vol. 1 , pp. 246-248.)

On July 3, 1915, The Port of Portland appealed from that decree, and on July 7, 1916, filed its papers therefor. (*Still, March term.*)

(Record Vol. 1, pp. 254-261.)

Wilhelmsen moved to set aside this decree and against its entry.

(Record Vol. 1, p. 249.)

And on the 19th day of July, at the July term of said Court, Wilhelmsen's motion was denied.

On July 21, 1915, Wilhelmsen appealed from the decree of June 24, 1915, in cause 6116. (*July term.*)

(Record Vol. 1, p. 262, see assignments of errors,

(Record Vol. 1, pp. 264-276.)

The decree in the Wilhelmsen case 6111 was not entered until the 25th day of October, 1915. (*July term.*)

(Record Vol. 1, pp. 126-127.)

The Court, after the March term, on the *ex parte* application of The Port of Portland undertakes to enter an order consolidating all the causes on appeal on the 25th day of October, 1915. (*July term.*)

(Record Vol. 1, p. 129.)

It will be noted that the "Thielbek" decree was entered in the *March term*, *to-wit*, June 24, 1915, and that appeals were taken from it in the *July term*.

But the *November term* of the District Court had commenced before The Port of Portland presented its attempted appeal in the Wilhelmsen cause, No. 6111, and final decree was entered January 3, 1916.

(Record Vol. 1, p. 137.)

So the situation presented is this:—

"Thielbek" decree June 24, 1915;

Appeals taken July, 1915;

Ex parte consolidating order October 25, 1915.

Neither Grace nor duPont had appealed in causes 6129 and 6130 and there had not yet been any appeal in cause 6111.

Cause 6111 was not disposed of until January 3, 1916, in the *November term*.

All of the proceedings which culminated in the order made in 1916, including the order of January 3, 1916, were made *after the March term had expired in which the "Thielbek" decree*

was entered and were made after the July term had expired in which the Wilhelmsen decree was entered.

Of the causes originally before the Court then we have now the "Thielbek" case, No. 6116, from the decree in which both The Port of Portland and Wilhelmsen appealed; and The Port of Portland has undertaken to bring here cause 6111, the Wilhelmsen case, as by an attempted appeal by a notice served against the decree of October 25, 1915, before the proceedings in that cause were final.

So Wilhelmsen presents this motion to dismiss the attempted appeal and affirm the judgment as to him in cause 6111, notice of which was given at the time Wilhelmsen filed his additional assignments of error on the 21st day of February, 1916.

(Record Vol. 1, p. 281, at middle of p. 284.)

If it was proper for the Court below to enter a final decree in favor of Knohr & Burchard and to determine costs in favor of Knohr & Burchard and to deny costs to Wilhelmsen, as the Court did do as shown by the record at the time it did it, then it must follow that the decree appealed from by The Port of Portland, entered October 25, 1915, is not final as to The Port of Portland.

It is only from final judgments or decrees

that appeals can be taken and no arrangement of the situation in this Court can give jurisdiction.

Mordecai v. Lindsay, 19 How. 199, at pp. 201, 2; 15 L. Ed. 624.

Green v. Fisk, 103 U. S. 518; 26 L. Ed. 485.

Bowker v. United States, 186 U. S. 141, 2; 46 L. Ed. 1092.

The final decree was not signed and filed until Knohr & Burchard obtained it and the rights of the parties are determined by the date of the actual entry.

Providence Rubber Co. v. Goodyear, 6 Wall, 153 at 156.

It is the rule, *and with uniform enforcement*, in the Circuit Courts of Appeals that Rule 24 with respect to specification of errors must be complied with and that assignments of errors in the record are not sufficient, and in the absence of specifications of error the result has been to dismiss the appeal or affirm the judgment.

Western Assurance Co. v. Polk, (C. C. A. 8th C.), 104 Fed. 649.

The brief of The Port of Portland as served in this case does not comply with Rule 24 of this Court not only in the case in which this motion is filed, but likewise in the other case of the "*Thielbek*," No. 6116, but considering it from the point of this motion alone it is an absolute

necessity that Rule 24 be complied with and so decided in this Circuit.

Walton v. Wild Goose Mining Co. (C. C. A. 9th C.), 123 Fed. 209, 211.

And a motion to amend is denied and appeals are dismissed in such cases.

Moline Trust Bank v. Wylie, 149 Fed. 734.

It is respectfully submitted that The Port of Portland has not properly appealed in the Wilhelmsen cause, No. 6111, as in this motion specified; and this Court is without jurisdiction in that case to hear the appeal.

WILLIAM C. BRISTOL,

Proctor for Wilhelm Wilhelmsen.

May 4, 1916.

Brief on the Merits

STATEMENT OF THE CASE

- (a) *Subject matter and who involved.*
- (b) *The pleadings and what they show.*
- (c) *Theory and issue.*
- (d) *The decrees, and their dates of rendition.*
- (e) *The appeals and their relation to each original case.*
- (f) *The case now before this Court.*

(a) *Subject matter and who involved:*

This record presents a *cause of collision* on navigable waters of the United States within the District of Oregon.

The bark "*Thielbek*" is and was a *German ship* owned by Knohr & Burchard, Nfl., Hamburg, Germany; and a treaty is now and was in August, 1913, in force and effect between Germany and the United States, among other things providing for uniform and consistent administration of the laws of the respective countries relative to maritime and other subject matters.

The steamship "*Thode Fagelund*" is and was a *Norwegian ship* owned then and now by Wilhelm Wilhelmsen of Tonsberg, Norway; and a treaty exists between Norway and the United States in force August, 1913, that among other things governs the transactions of the respective treaty-making powers upon all the subject matters contracted about, including maritime affairs.

The procedure in admiralty in collision cases is fixed by the fifteenth (15) admiralty rule promulgated by the Supreme Court of the United States with congressional authority, and under that rule The Port of Portland was sued *in personam* with respect to the things occasioned and committed by its tug boat and pilots resulting in the collision.

A maritime tort necessarily arose from this collision under the general admiralty and mari-

time jurisprudence of the United States, the exclusive jurisdiction to hear and determine such causes being vested by the acts of Congress exclusively in the District Courts of the United States sitting in admiralty, regardless of any state statute.

(b) *The pleadings and what they show:*

It was the contention of the libellants, Knohr & Burchard, owners of the "*Thielbek*," (1) either that she was damaged by the navigation of the "*Fagelund*" under the direction of Nolan, or (2) *that Pease was inexperienced and the collision was occasioned by his specified negligence and the wrongful navigation of the "Ocklahama."*

(Record, Vol. 1, p. 171.)

It was, moreover, the contention of Knohr & Burchard that the circumstances of the collision involving their ship, the "*Thielbek*," authorized proceedings to limit their liability; and as owners of the "*Thielbek*" they did on October 16, 1913, present their petition to limit their liability. This matter was before the Court below *long prior* to the trial resulting in the decrees (Record, Vol. 1, pages 294, 301), *in fact one whole year before.*

(Record, Vol. 1, page 94.)

Although Knohr & Burchard thus petitioned to limit their liability, nevertheless, when they

filed their libel in Cause 6116 they adopted and repropounded Articles VI to XII of the original libel of Wilhelmsen.

(Record, Vol. 1, pages 160-170.)

It is very important to accurate understanding of the cause tried to see fully the recitation of facts made by Knohr & Burchard as they present the most favorable view of their own theory of recovery. At record, Vol. 1, pages 36 and 37, they positively allege and show negligent navigation as follows:—

The "*Ocklahama*," with the "*Thielbek*" in tow, having weighed anchor at Young's River about three minutes past three as aforesaid, proceeded with her tow as one vessel upstream, keeping close in towards the Astoria docks, to-wit, **ABOUT TWO HUNDRED (200) FEET OFF, AND WHEN CLOSE TO CALENDAR DOCK IN THE CITY OF ASTORIA, THE PILOT OF THE "OCKLAHAMA" SIGHTED THE NORWEGIAN STEAMER "THODE FAGELUND" BEYOND AND OVER THE DREDGE "CHINOOK," AND EVIDENTLY PROCEEDING DOWNSTREAM; AT THIS TIME HE COULD SEE THE LIGHTS OF THE "THODE FAGELUND," BUT NOT HER HULL, AND SHE WAS APPROXIMATELY FROM FIFTEEN HUNDRED (1500) TO TWO THOUSAND (2000) FEET AWAY;** the "*Ocklahama*" was immediately put under a slow bell, and a few seconds thereafter the "*Thode Fage-*

lund" blew two whistles, signifying her desire to pass the "Ocklahama" and tow on her starboard hand; the "Thode Fagelund" was at this time still behind the "Chinook," showing to the "Ocklahama" her green side light and two white range lights, and was proceeding on a course diagonally across the course of the "Ocklahama" and "Thielbek," which at this time showed their red side light to the "Thode Fagelund," the "Ocklahama" and "Thielbek" being at that time on her starboard hand; **THE "OCKLAHAMA" DID NOT ANSWER THE FIRST SIGNAL OF THE "THODE FAGELUND," FOR THE REASON THAT IT WAS APPARENT TO THE PILOT OF THE "OCKLAHAMA" THAT IN A FEW SECONDS THE "THODE FAGELUND" WOULD EMERGE FROM BEHIND THE "CHINOOK," WHEN HE WOULD THEN BE BETTER ABLE TO TAKE IN THE WHOLE SITUATION, BUT THE HELM OF THE "OCKLAHAMA" WAS PUT TO STARBOARD, AND SHE AND THE "THIELBEK" IMMEDIATELY COMMENCED TO SWING TO PORT; THAT IN A VERY SHORT TIME, TO-WIT, TWENTY (20) OR THIRTY (30) SECONDS, THE "THODE FAGELUND" CAME INTO THE CLEAR FROM BEHIND THE STERN OF THE "CHINOOK," AND, SHOWING HER GREEN LIGHT AND TWO MASTHEAD RANGE LIGHTS, AGAIN BLEW TWO (2) WHISTLES, SIGNIFYING HER CONTINUED INTENTION TO PASS TO THE STARBOARD OF THE**

"OCKLAHAMA" AND TOW; at this time, libelants believe and therefore say that the only side light of the "*Ocklahama*" and tow visible to the "*Thode Fagelund*" was the red light; this signal the "*Ocklahama*" immediately answered by two (2) whistles, signifying her assent to the passage; **AT OR JUST BEFORE THIS EXCHANGE OF SIGNALS, THE ENGINES OF THE "OCKLAHAMA" WERE STOPPED, AND AT THIS EXCHANGE OF SIGNALS HER ENGINES WERE BACKED HALF SPEED, AND IMMEDIATELY THEREAFTER FULL SPEED ASTERN,** and her helm was thrown to port, which, by reason of the reversed paddle wheel throwing the water a gainst the rudders, threw the stern of the "*Ocklahama*" and "*Thielbek*" to the starboard and their bows to port.

(Record, Vol. 1, pp. 36 and 37,)

These facts are alleged acts performed by Pease. These are the very acts for which the trial court condemned the navigation of the "Thode Fagelund."

(Record, Vol. 1, p. 92-3.)

It is also alleged by both claimants and respondent the port of Portland:

The two vessels proceeded, as one and under the control of the "Ocklahama," on their voyage upstream through the harbor at Astoria.

(Vol. 1. Record p. 43.)

That the said pilot on the "Ocklahama" was at the wheel and was in general charge of both vessels and a watchman was on duty with him in the pilot house.

(Vol. 1. Record p. 44.)

That the two vessels proceeded as one on their voyage up the Columbia River on the Oregon side thereof, to a point in front of the port of Astoria about abreast of the Callender Dock.

(Vol. 1. Record p. 44.)

The "Ocklahama" was by her crew lashed on the port quarter of the "Thielbek" with her stern projecting beyond the stern of the "Thielbek," and the two vessels, proceeding as one and under the sole control of the "Ocklahama," commenced their voyage up stream through the harbor at Astoria.

(Art. IV. Rec. Vol. I. p. 154, Libel of Knohr & Burchard.)

In the answer of the port of Portland it is alleged:

The engines upon the steamboat "Ocklahama" were stopped and immediately thereafter the said steamboat "Ocklahama" was backed full speed on a port helm and continued to back full speed on a port helm for between three and four minutes and practically stopped the headway of the steamboat "Ocklahama" and of the bark "Thielbek," and a few seconds later the steamer

“Thode Fagelund” and the bark “Thielbek” came together in such manner that the stern of the bark “Thielbek” struck and collided with the port bow of the steamer “Thode Fagelund” at and near the stem thereof in the manner set forth in the libel.

(Record, Vol. I. p. 49.)

Amendment of June, 1908, The Port of Portland is authorized and empowered, among other things:

* * * “To purchase, lease, **CONTROL AND OPERATE STEAM TUG-BOATS AND STEAM AND SAIL PILOT-BOATS UPON SUCH RIVERS AND UPON THE COLUMBIA BAR PILOTAGE GROUNDS, AND TO COLLECT CHARGES FROM VESSELS EMPLOYING SUCH TUGS SO OPERATED AND FOR PILOTAGE SERVICES RENDERED BY EMPLOYEES OF SAID THE PORT OF PORTLAND,** and said The Port of Portland shall have the right to claim and collect salvage for services rendered to vessels in distress **IN THE SAME MANNER AS A NATURAL PERSON. THE CHARGES FOR TOWAGE AND PILOTAGE SHALL BE FIXED BY THE BOARD OF COMMISSIONERS OF THE PORT OF PORTLAND AND SHALL BE PUBLIC AND PUBLISHED TO THE WORLD.** The charges for towage of sailing vessels shall include the services of such pilots as may be supplied by The Port of Portland. The charges

for pilots supplied by The Port of Portland to steam vessels shall be fixed by its Board of Commissioners, but shall in no respect exceed the charges fixed by the State of Oregon for pilots upon the bar pilotage grounds and upon the river pilotage grounds upon the Columbia and Willamette Rivers."

(Record Vol. I. Page 54.)

As the steamboat "Ocklahama" and the "Thielbek" so lashed together proceeded on their voyage up the river and were passing Calender Dock in Astoria harbor, the said A. L. Pease, Jr., pilot upon the "Ocklahama," being then in charge and directing the navigation of the steamboat and her tow

(Record Vol. I. p. 57.)

The Port of Portland further says: That as soon as the said pilot saw the lights of the steamer over the dredge "Chinook" the steamboat "Ocklahama" was put under a slow bell and that very soon thereafter the said pilot heard two short blasts of the steam whistle blown from the steamer, the lights of which were seen beyond the dredge "Chinook" and which afterwards proved to be the steamer "Thode Fagelund," but that, by reason of the fact that the steamer "Thode Fagelund" was at that time beginning to round the stern of the dredge "Chinook" the said pilot, A. L. Pease, Jr., was unable

to say with certainty whether a safe passage could be made to starboard and *that therefore no answer was given to the said two whistles until the steamer "Thode Fagelund" should come out from behind the dredge "Chinook" and until the said pilot could determine whether the steamer "Thode Fagelund" could pass safely to starboard of the steamboat "Ocklahama" and the bark "Thielbek," but that the said pilot at once put the helm of the steamboat "Ocklahama" hard astarboard in such manner that the steamboat "Ocklahama" with her tow swung to port; that as soon as the "Thode Fagelund" came from behind the dredge "Chinook," and as soon as her position could be ascertained and was ascertained by the said pilot, A. L. Pease, Jr., the said pilot heard two short blasts of the steam whistle blown from the steamer "Thode Fagelund" and immediately answered the same by blowing two short blasts of the steam whistle from the steamboat "Ocklahama;" that said pilot having so ascertained the position of the steamer "Thode Fagelund" and her course, deemed that the said steamer "Thode Fagelund" could pass*

Record Vol. I. pp. 57 and 58.)

safely on the starboard side of the steamboat "Ocklahama" and her tow, the bark "Thielbek;" that at said time the "Ocklahama" was approaching the dredge "Chinook" and that said pilot, A. L. Pease, Jr., believing that there was

danger, if the steamboat "Ocklahama" and her tow, the bark "Thielbek," should continue on the course upon which they were then moving, of their running upon and colliding with the said dredge "Chinook," thereupon and for the purpose of avoiding a collision with the dredge "Chinook" and for this purpose only, *at once stopped the engines* of the steamboat "Ocklahama" *and backed full speed astern on a port helm;* that at said time the pilot upon the "Ocklahama" believed that the said steamer "Thode Fagelund," pursuing the course which she was pursuing at the time she came from behind the dredge "Chinook" *and her position and course were ascertained by the said pilot,* would have passed safely to starboard of the steamboat "Ocklahama" and of her tow, the bark "Thielbek," but that the steamer "Thode Fagelund," instead of pursuing her course, or swinging to her port, began to swing to her starboard and continued to swing to her starboard until the red light of the steamer "Thode Fagelund" came in view of the Ocklahama;" *that the steamboat "Ocklahama" with her tow continued to back full speed astern for about three minutes so that most of the headway of the said steamboat and of the bark "Thielbek" had been stopped,* and during said time the said steamboat "Ocklahama" with her said tow continued to swing to her port.

(Record Vol. I. p. 59.)

Alleges that on the 24th day of August, 1913, at or about the hour of three o'clock in the morning the steamer "Thode Fagelund," **HAVING THE SAID PILOT M. NOLAN IN CHARGE AND DIRECTING HER NAVIGATION**, weighed anchor from a point in the Columbia River off and opposite the dock of the Oregon-Washington Railroad & Navigation Company in Astoria harbor, and, **UNDER THE DIRECTION OF SAID M. NOLAN AS PILOT STARTED AHEAD UNDER A SLOW BELL AND CONTINUED TO PROCEED UNDER SAID SLOW BELL FOR ABOUT FIVE MINUTES AND THEN INCREASED ITS SPEED TO HALF SPEED AHEAD** and continued to proceed at said half speed ahead until within about four hundred feet of and above the dredge "Chinook," a vessel about 450 feet in length, the property of the United States at said time, anchored in the Columbia River at a point off and about opposite the middle of the said dock and lying directly across the channel of said river, leaving the channel so obscured that one on a vessel in the channel of said river above where the said dredge was anchored could not see a vessel coming up the channel of said river below the point where the said dredge was anchored; that when the "Thode Fagelund" had arrived on her course at a point in said channel about 400 feet from and above the said dredge "Chinook," which was then swinging to flood tide with her stern toward the Astoria side of the

channel, **THE SAID NOLAN, PILOT AS AFORE-
SAID, BEING THEN ON WATCH AND DI-
RECTING THE NAVIGATION OF THE SAID
STEAMER,** *saw a sailing vessel under tow
almost head-on and about one-quarter of a
point on the starboard bow of the said steamer,
which sailing vessel was afterwards ascertained
to be the bark "Thielbek," in tow of the steam-
boat "Ocklahama;" that when the said Nolan
saw the said sailing vessel under tow, he blew
two short blasts of the steam whistle on the said
steamer, signifying his intention to pass to star-
board of the said sailing vessel under tow, he,
the said Nolan, believing at said time that the
said steamer "Thode Fagelund" could not pass
safely to port of the said bark "Thielbek" and
the steamboat "Ocklahama" and could pass
safely to starboard of said bark "Thielbek" and
the said steamboat "Ocklahama" by reason of
the course which the said "Thode Fagelund" was
then pursuing and by reason of the position of
the said dredge "Chinook;" that no answer to
the said two blasts was heard on the steamer
"Thode Fagelund;" that thereupon the said M.
Nolan stopped the engines of the steamer "Thode
Fagelund" and having then come out from be-
hind the stern of the dredge "Chinook" and
deeming it safe to pass to starboard of the said*
(Record Vol. I. pp. 62 and 63.)

sailing vessel and of the said steamboat "Ockla-
hama" and not safe to pass to port of the said

bark and the said steamboat, the said Nolan gave two short blasts of the steam whistle of the "Thode Fagelund" and immediately thereafter heard two short blasts in answer thereto given by the steamboat "Ocklahama"; that immediately after hearing the said two short blasts from the steamboat "Ocklahama," the steamer "Thode Fagelund" having then come from behind the dredge "Chinook," so that the position and the course of the bark "Thielbek" and of the steamboat "Ocklahama" could be more plainly seen, apprehended that there was imminent danger of a collision between said steamer "Thode Fagelund" and the said sailing vessel, **AND THAT THEREUPON THE SAID NOLAN AT ONCE REVERSED THE ENGINES OF THE "THODE FAGELUND" AND DROVE THE SAME FULL SPEED ASTERN IN ORDER TO RETARD THE HEADWAY OF THE STEAMER "THODE FAGELUND,"** so that the bark "Thielbek" and the steamboat "Ocklahama" might have time to pass on their course out of danger of a collision with the said steamer "Thode Fagelund" and immediately gave four short blasts of the steam whistle of the "Thode Fagelund" and at once and to further retard the headway of the "Thode Fagelund," dropped the port anchor of the "Thode Fagelund" and again gave four short blasts of her steam whistle of the "Thode Fagelund"; that each of said acts on the part of the pilot Nolan was done promptly, for the purpose

of and was adapted to avoid a collision between the bark "Thielbek" and the steamboat "Ocklahama" and the said steamer "Thode Fagelund."

(Record Vol. I. pp. 64 and 65.)

THE OWNERS OF THE "THIELBEK" SAY IN THEIR LIBEL, (following the fact that the "Ocklahama" did not answer the first signal), that in a very short time, to-wit: twenty (20) or thirty (30) seconds, the "Thode Fagelund" came into the clear from behind the stern of the "Chinook" and, showing her green light and two mast head range lights, again blew two (2) whistles signifying her continued intention to pass to the starboard of the "Ocklahama" and tow; at this time, libelants believe and therefore say that the only side light of the "Ocklahama" and tow visible to the "Thode Fagelund" was the red light; **THIS SIGNAL THE "OCKLAHAMA" IMMEDIATELY ANSWERED BY TWO (2) WHISTLES, SIGNIFYING HER ASSENT TO THE PASSAGE; AT OR JUST BEFORE THIS EXCHANGE OF SIGNALS, THE ENGINES OF THE "OCKLAHAMA" WERE STOPPED, AND AT THIS EXCHANGE OF SIGNALS HER ENGINES WERE BACKED HALF SPEED, AND IMMEDIATELY THEREAFTER FULL SPEED ASTERN, AND HER HELM WAS THROWN TO PORT, WHICH, BY REASON OF THE REVERSED PADDLE WHEEL THROWING THE WATER AGAINST THE RUDDERS, THREW THE STERN OF THE**

"OCKLAHAMA" AND "THIELBEK" TO THE STARBOARD AND THEIR BOWS TO PORT; THAT THE "OCKLAHAMA" CONTINUED BACKING FULL SPEED FROM THIS TIME UNTIL THE COLLISION.

(Record Vol. I. p. 157.)

AND ESPECIALLY ALLEGE THAT THE "OCKLAHAMA" WAS LEFT IN CHARGE OF A YOUNG AND INEXPERIENCED PILOT, AND THAT HER MASTER WAS IN HIS BUNK WHILE NAVIGATING A NARROW PASSAGE WHERE SHIPS WERE LIKELY TO BE MET, AND THAT THEREIN THE PORT OF PORTLAND WAS AT FAULT; THAT THE "OCKLAHAMA" AND TOW APPROACHED SAID PASSAGE AT FULL SPEED, AND THAT THEREIN THE PORT OF PORTLAND WAS AT FAULT; THAT THE PILOT OF THE "OCKLAHAMA," UPON RECEIVING THE FIRST WHISTLE FROM THE "THODE FAGELUND," PUT HER HELM TO STARBOARD AND FAILED TO ANSWER SAID FIRST WHISTLE OF THE "THODE FAGELUND," AND IN SO DOING WAS NEGLIGENT, AND THEREIN THE PORT OF PORTLAND WAS AT FAULT; THAT THE "OCKLAHAMA" WAS NEGLIGENTLY NAVIGATED IN THAT NO SIGNAL WAS GIVEN THAT HER ENGINES HAD BEEN PUT FULL SPEED ASTERN.

(Record Vol. I. p. 171.)

Wilhelmsen propounded among other things, the following:

For it is true, as more particularly charged in lines 6, 7 and 8 of page 17 of Article XII of said libel of said "Thielbek" that the said Turppa was in his bunk while his boat, the "Ocklahama," was navigating a narrow passage where ships were likely to be met, and it is and was as thereing stated *the fault of The Port of Portland in respect of the matters and things in said Article IV of said libel charged against this answering respondent and his ship, and it is not true, as the libelant would now have it believed, that Turppa, although in his bunk, was observant of the navigation of his vessel in a proper manner and under proper control.*

(Record Vol. 1, p. 177.)

Every ingenuity of counsel has been employed to put these vessels on crossing courses *when the signals were exchanged* but the fact is Pease came up with a starboard helm (see "pleadings" herein) and *was head on when signals were exchanged*, and this Wilhelmsen made very plain:

But the fact is that said vessels were proceeding head and head or nearly so and so nearly so that the "Thielbek" and "Ocklahama" when first seen could and should have negotiated the passage that was signaled to them and which was afterwards answered and assented to by them.

(Record Vol. I. p. 179.)

At the time of giving said signal the "Thode Fagelund" was in the clear, and this answering respondent says that the said Roy Pease, pilot on the "Ocklahama," then at that time committed a fault of navigation and that the said "Thielbek" and "Ocklahama" were faultily and negligently navigated in this, that had said Roy Pease been an experienced pilot he would have and should have given the first signal of an intention to pass, they being the lighter vessels and more easily directed and navigated, and if it be true that the said pilot Pease then put his helm to starboard and that the "Ocklahama" and "Thielbek" immediately commenced to swing to port, then it is likewise true, as in the libel against the "Thielbek" in cause No. 6111 alleged, that he did not hold his helm, for had he done so he would have cleared the "Thode Fagelund" upon the course signaled by her and assented to by the said Roy Pease.

(Record Vol. I. p. 179.)

And the court below found the fact to be, "the collision was *on a line fore and aft*."

(Record Vol. I. p. 88 mid. of Page.)

This answering respondent says that the "Thode Fagelund" never did change her course and that it is and was as alleged in the libel in cause No. 6111, at the time of the collision and for a considerable time prior thereto, the "Thode Fagelund" had no headway, her anchor chain

was down and her propeller running full speed astern, and if it be true that the said Turppa, as alleged in the libel of the "Thielbek," although in the Texas, was awake and heard the whistles and that the said Roy Pease was navigating the "Ocklahama" properly, then they both heard, long before the collision, the alarm whistles consisting of four rapid blasts, given twice at intervals as provided by the inland navigation rules and were thereby aware of the position of the "Thode Fagelund," and it is not true that she changed or altered her course in the direction of the "Ocklahama" and tow; that it is not true that the "Thode Fagelund" continued to alter her course as alleged in said libel more and more to her own starboard side, but the fact is that just a short interval of time before the collision, and while the "Thode Fagelund" was stopping and her anchor down and was swinging with the motion of her wheel so that the red light may have come into view, the "Ocklahama" never altered her course, but navigated the "Thielbek" and herself directly into the port bow of the "Thode Fagelund" at a high rate of speed and in the manner as alleged in the libel in cause number 6111 and so that the "Ocklahama" broke her hawsers and ran up alongside the "Thode Fagelund" to about a mid-ship position.

Record Vol. I. pp. 180-1.)

Wilhelmsen further propounded:

And in pursuance of Section 4487 of Revised

Statutes of the United States, it is now propounded and shown that in Article XII of said libel, page 17 thereof, and to that extent and for a more full answer to the allegations of said libel, this answering respondent says that Knohr & Burchard, the libelants, allege:

(Lines 4 to 17, page 17, libel in cause No. 6116, Article XII.)

“Especially allege that the “Ocklahama” was left in charge of a young and inexperienced pilot, and that her master was in his bunk while navigating a narrow passage where ships were likely to be met, and that therein The Port of Portland was at fault; that the “Ocklahama” and tow approached said passage at full speed, and that therein The Port of Portland was at fault; that the pilot of the “Ocklahama,” upon receiving the first whistle from the “Thode Fagelund,” put her helm to starboard and failed to answer said first whistle of the “Thode Fagelund,” and in so doing was negligent, and therein The Port of Portland was at fault; that the “Ocklahama” was negligently navigated in that no signal was given that her engines had been put full speed astern.”

And these being the facts as so charged, then it cannot be true that the “Ocklahama” did the things which are alleged in paragraph VI of said libel, and so, without further answering, respondent says that the circumstances and occur-

rences propounded in said Article VI did not occur or come about by anything that was done by the "Thode Fagelund."

Record, Vol. I. Page 182.)

It is denied that the navigation of the "Thode Fagelund" was in the charge of M. B. Hansen, master of the "Thode Fagelund," for the fact is that the navigation of said "Thode Fagelund" was solely and only in charge of **Michael Nolan**, one of the pilots in the employ of **The Port of Portland**, and that said **Michael Nolan** had been furnished by **The Port of Portland** to take the said "Thode Fagelund" to sea, and this answering respondent says that if there is any negligence or fault of navigation attributable to the "Thode Fagelund" that the responsibility therefor lays with **The Port of Portland**.

(Record, Vol. I. Page 183.)

And to join with the libel of the said "Thielbek" in cause number 6116 against The Port of Portland, propounds and articulates and says it is true as in said libel charged, namely:

(a) That the "Ocklahama" was left in charge of a young and inexperienced pilot, to-wit, Roy Pease;

(b) That her master, Isaac Turppa, was in his bunk while his vessel was navigating a narrow passage where ships were likely to be met;

(c) That the "Ocklahama" and "Thielbek" approached the narrow passage between the

stern of the dredge "Chinook" and the Astoria docks, wherein the "Thode Fagelund" then was, at full speed and without reducing speed;

(d) That the said Roy Pease, the pilot of the "Ocklahama," upon receiving the first whistle from the "Thode Fagelund," failed to answer;

(e) That the "Ocklahama" did not signal at any time that her engines were full or half speed astern;

(f) That the "Ocklahama" 'did not signal at any time otherwise than to give her assent to a starboard passage; and that in each of said particulars **The Port of Portland was at fault, and of the matters herein propounded this answering respondent craves consideration of your honors reserving the right to amend his libel at first instance in conformity thereto.**

(Record, Vol. I. pp. 185 and 186.)

And this answering respondent here reiterates and alleges as part of his answer hereto all the matters and things in his libel in cause number 6111 hereinbefore referred to and on file in this Court as fully and completely as if the same had been filed in this cause and to the end that this Court may here consider this case, make complete investigation and have full consideration of the same and all of the facts therein propounded.

(Record, p. 187, Vol. I.)

Whether the cause at first instance upon either libel or the consolidation cause is made issuable and triable in this Court upon the theory of vessels approaching head and head or nearly so, or whether it should be upon that other and different claim that the vessels involved were approaching upon diagonal courses, this respondent propounds and says, as part of his answer here to, that in any or either event and regardless of how the issue is made up, the "Thode Fagelund" was in fact the burdened vessel, for that she was heavily laden and known by those operating the "Thielbek" and "Ocklahama" to be upon her way to sea and seen by the "Thielbek," as they allege and propound, long before there was any danger of a collision, and at said times the "Thode Fagelund" with the conditions of the dredge "Chinook" then in the channel and from her anchorage being compelled to execute a maneuver around or by the stern thereof, all of which was well known to the "Thielbek" and "Ocklahama,"

* * * * *

reference being had to Rule XI and Article 27 of the Pilot and Sailing Rules, approved by the Acts of Congress.

(Record, Vol. I. pp. 187-188.)

The Port of Portland admitted that the allegations of Wilhelmsen were true on the subject of laden vessel and intended movements:

This respondent admits that the respondent

knew that the "Thode Feguland" had been laden at Portland with a full cargo and that being so laden and having duly cleared, was leaving the port of Portland to arrive off the port of Astoria so that she might come to an anchorage off the dock or wharf of the Oregon-Washington Railroad & Navigation Company in the channelway and avail of the outgoing flood tide on the morning of Sunday for her voyage upon the high seas.
(Vol. I, Record, p. 45.)

It was the contention of the libellants, Grace and Dupont, the cargo owners, that they had respectively been damaged *by the negligent navigation of the "Thielbek" and "Ocklahama"* (Record, Vol. 1, p. 295), but no charge was made by either of them against the "*Thode Fagelund*" or its owner Wilhelmsen.

(c) *Theory of trial and issue presented:*

The theory upon which the pleadings were framed, the evidence presented, the arguments made and the causes consolidated and considered in the court below was—that there was a maritime tort committed by The Port of Portland (i) either by its tug boat "Ocklahama" or (ii) by its pilots, Pease and Nolan, through negligent and careless navigation causing a collision resulting in damage civil and maritime to both ships involved, and the cargo of one of them.

The proceedings were not at any time grounded upon the claim, nor was it conceded by any one of the four libelants, that any state, however sovereign, could create an instrumentality superior in right, or preferred in remedy or limited as to liability against the laws of the United States and the exclusive plenary jurisdiction of the federal courts in matters of admiralty and maritime jurisdiction.

The Port of Portland apparently seeks to set aside well settled rules of law and graft upon the admiralty and maritime jurisdiction of the United States a new and independent theory of limited liability, notwithstanding that Congress itself has legislated thereon and the decisions of the courts of the United States are uniformly against its contentions.

(d) *The decrees and their dates of rendition:*

Arising out of this collision were the following causes:

No. 6111, Wilhelm Wilhelmsen v. "Thielbek" and Port of Portland. August 30, 1913.

No. 6116, Knohr and Burchard v. "Thode Fagelund" and Port of Portland. September 13, 1913.

No. 6129, W. R. Grace & Co. v. "Thielbek" and Port of Portland. October 9, 1913.

No. 6130, Dupont v. "Thielbek" and Port of Portland. October 9, 1913.

No. 6139, Petition of Knohr and Burchard to limit liability. October 16, 1913.

On September 8th, 1914, a consolidation order was entered.

(Record, Vol. I, p. 4.)

November 16th, 1914, the court filed its opinion upon the evidence submitted in the causes thus tried.

(Record, Vol. I, pp. 85-94.)

From this has resulted one of the strangest anomalies in admiralty procedure:

On November 18, 1914, said libelant filed in said cause a motion for decree in accordance with the said opinion. On December 7, 1914, *this cause was heard* by the Court before the Honorable R. S. Bean, District Judge, upon the form of decree. On December 14, 1914, *said Court filed an opinion settling the decree* to be entered in this cause, said opinion being entitled in this cause and also in cause No. 6111, *and was filed in cause No. 6111*. On December 15, 1914, objections were filed by said claimant to the form of decree applied for. Thereafter, on December 15, 1914, *there was entered in said cause an interlocutory decree* awarding damages to the said libelant, together with interest and costs, and thereafter, on May 31, 1915, this cause came

on for further trial by the Court before the Honorable Robert S. Bean, District Judge, as to the amount of damages sustained by the libelant, and thereafter, on June 14, 1915, the Court determined the amount of damages suffered by said libelant *and filed in said cause its opinion* and directed a decree to be prepared in accordance with said opinion, and on said date said libelant submitted a form of decree, and on June 15, 1915, objections to the said proposed form of decree were filed by the said claimant. Thereafter, on June 22, 1915, said claimant filed in said cause objections to the form of decree. *Thereafter, on June 24, 1915, a final decree was duly entered in said cause in favor of the said libelant and against the steamer "Thode Fagelund" and The Port of Portland and either of them for the sum of \$12,805.26, together with interest thereon from October 20, 1913, until paid, and costs to be taxed.* Thereafter, on June 29, 1915, said claimant filed *in said cause a motion to vacate said decree, and thereafter said motion came on* to be heard by the Court before the Honorable R. S. Bean, District Judge, and on July 19, 1915, an order was entered denying said motion.

Record, Vol. I, pp. 10 and 11.)

(e) *The appeals and their relation to each original case:*

Wilhelmsen was thereupon forced to appeal, and notwithstanding the causes were consolidated, considered and submitted together, yet the Court permitted, over the objections of Wilhelmsen as thus shown, the entry of a decree in favor of the "*Thielbek*," and the rest of the same subject matter was not determined until the following September and October of 1915.

On July 7th The Port of Portland having appealed, Wilhelmsen on July 21st, 1915, appealed from the decree entered against him June 24th, 1915, in Cause 6116 in favor of the owners of the "*Thielbek*," and filed his necessary papers on appeal.

Record, Vol. I, pp. 11 and 12.)

On September 29th and 30th, 1915, Wilhelmsen's original Cause 6111 passed to an opinion, together with Causes 6129 and 6130, upon the right of recovery and question of damages, and the court dismissed the libels of Grace and Dupont and allowed Wilhelmsen his damages in the sum of forty-three thousand eight hundred four and 65-100 dollars (\$43,804.65,) October 25th, 1915.

(Record, Vol. I, pp. 119-125.)

On October 25th, 1915, a decree for Wilhelm-
sen was signed and entered, in Cause No. 6111,
the original cause.

(Record, Vol. 1, pp. 126-127.)

No appeals had been prosecuted by Grace and Dupont in Causes 6129 and 6130, and the appeal had already been prosecuted in Cause 6116, as above noted, before the opinion and decree of October 25th, 1915, were given and entered.

Nevertheless, on October 25th, 1915, on the *exparte* application of The Port of Portland and without notice, the court undertook to enter an order and did enter an order consolidating *all of the causes for purposes of appeal.*

(Record, Vol. I, p. 129.)

On the 9th and 16th of November, 1915, thereafter, The Port of Portland filed its papers on appeal in Cause 6111, *the original cause*, at first instance.

(Record, Vol. I, pp 129-134.)

On the 27th day of November, 1915, following came Knohr and Burchard and made their motion for a final decree in Cause 6111, and final decree, (with a large number of other proceedings were had over the objections of Wilhelm-
sen at that time), was entered on January 3rd, 1916, dismissing the libel of Wilhelm Wilhelm-
sen against the "*Thielbek*" and taxing costs to Wilhelm-
sen in the sum of twenty-two hundred forty-seven and 93-100 (\$2247.93) dollars, in

favor of Knohr and Burchard, owners of "*Thielbek*."

(Record, Vol. I, pp. 136, 137 and 137 to 147.)

In the manner the cases were presented and tried, the court had no power to address itself the second time over *Wilhelmsen's* objections to further determinations against him after decree entered in the "*Thielbek*" case some months before, which afforded as the case stood then the only way *Wilhelmsen* could recover from The Port of Portland the sums decreed against him in favor of the "*Thielbek*" owners.

(f) *The case before this Court:*

The Court below refused to wholly abide by any theory presented to it by any party and adopted one of its own.

The theory of decision adopted by the Court and the method of procedure in these cases has led to the situation now presented to this Court, viz: That on any theory of the whole case The Port of Portland is liable as the primary tortfeasor.

The tug "Ocklahama," the pilot Pease thereon and the master Turppa thereon, with the tow of the "Thielbek," constituted one element among the instrumentalities employed by The Port of Portland in bringing about the injuries complained of; the other element was its pilot Michael Nolan. The result was a collision (a

maritime tort), committed by an offending thing engaged in navigation. The consequence was damage and injury to both vessels.

Unhappily for reasons seemingly directly contrary to uncontradicted and *without conflicting evidence* the trial Court dismisses all considerations of negligent navigation upon the part of the "Ocklahama," its pilot and captain, although charged to it by all of the parties, save and except The Port of Portland.

For a like unknown reason, the trial Court mulcts the owner of the "Thode Fagelund" in all of the damages sustained by the "Thielbek" for the negligence of The Port of Portland's pilot.

THIS APPEAL PRESENTS THE QUESTION THAT THE ACTS OF PEASE, THE PILOT OF THE "OCKLAHAMA," AND THE NEGLIGENT NAVIGATION OF THE "OCKLAHAMA" WAS THE ACTUAL CAUSE OF THE COLLISION AND THAT IN EITHER EVENT, WHETHER NOLAN WAS NEGLIGENT, AS THE COURT FOUND, OR WHETHER PEASE WAS NEGLIGENT, AS THE COURT OUGHT TO HAVE FOUND, THE LIABILITY RESTS WITH THE PORT OF PORTLAND AS TO BOTH VESSELS.

THE EVIDENCE.

Next following is given portions of the uncontradicted testimony of witnesses in respect of whose testimony there is no conflict:

BERGMANN, master of the "Thielbek," testified as follows:

Q. Do you know who the captain of the "Ocklahama" is?

A. Yes.

Q. What is his name?

A. Turppa.

Q. Captain Turppa?

A. Captain Turppa, yes, sir.

Q. Who was the pilot?

A. Pease.

Q. Where were you lying when you made fast?

A. It was about four miles west from Astoria.

Q. Near the Young River?

A. Near Young River.

(Record, Vol. I, p. 305.)

Q. Did you take these observations you have testified about from the forecastle head or from the aft part of your ship?

A. From the fo'castle-head.

Q. At the time you made these observations she was then attached to and a part of the "Thode Fagelund"?

A. Yes.

Q. So the position you place your ship in was also the position of the "Fagelund?"

A. Yes.

Q. You think that was about 150 feet over your port bow from the dredge?

A. Yes, the stern.

Q. Over the port bow 150 feet and 350 feet to the dock?

A. Yes.

Q. That would make 500 feet?

A. Yes, sir.

(Record, Vol. I, pp. 316-317.)

Q. Then you must think the dredge "Chinook" took up about a thousand feet of that channel. Is that right?

A. No.

Q. How much room did that dredge "Chinook" take up that morning?

A. I don't understand.

Q. Let me put it this way: Suppose you had been navigating your ship yourself from your position on the fore-castle-head. *Was there room for you to go by on either side between the dredge or the dock and the "Thode Fagelund"? Plenty of room?*

A. Oh, yes.

(Vol. I, Record, p. 317.)

Q. In order that we may know how you found that to be all right, tell us how the tug was fastened?

A. It was fastened by the stern on the port side.

Q. On the port quarter of your ship?

A. Yes, sir.

(Record, Vol. I, p. 323.)

Q. I understood you to say that when you struck the "Fagelund" that the "Ocklahama" tore all that tow-line loose?

A. Yes, that is it.

(Record, Vol. I, p. 325.)

WILLIAM EGGARS, the Mate, called as a witness for the libelants, having been duly sworn, testified as follows:

Questions by Mr. Wood:

Q. What is your name?

A. William Eggars.

Q. You are the First Officer of the "Thielbek"?

A. Yes, sir.

(Record, Vol. I, p. 359.)

Q. Then what next did you see in the way of lights indicating a vessel?

A. I saw a light coming up forward, two mast-head lights and a green light.

Q. And what relation were they to your course, which side of it?

A. I just see the green light coming up; she showed just clear from our ship on the starboard side.

Q. (Mr. Bristol) She showed from your ship on the starboard side?

A. Yes.

Q. (Mr. Bristol) Starboard side?

A. Yes, I had been standing on the starboard side high up on the poop.

Q. Over against the rail of your ship?

A. Yes, sir.

Q. (Mr. Bristol.) The starboard side of your ship?

A. Yes, sir.

Q. This green light and those two mast lights seemed to be practically just ahead of you?

A. Yes.

Q. Except it was only showing the green light?

A. Yes, it was just clear from our bow.

(Record, Vol. I, pp. 364-365.)

Q. Now, then, when you saw this green light on the approaching steamer, what relation was it in line between you and the "Chinook"; what relation to the "Chinook," we will say, on a line drawn from you to the green light?

A. I couldn't see the "Chinook" from the starboard side at all; she was on the port side.

Q. You saw the green light clear of the "Chinook"?

A. Yes.

(Record, Vol. I, p. 367.)

Q. Did you hear any whistle?

A. Yes, sir.

Q. From what vessel?

A. AS SOON AS I SEEN THE GREEN LIGHT I HEARD TWO WHISTLES BLOWING FROM THE STEAMBOAT AHEAD.

Q. AS SOON AS YOU SAW THE GREEN LIGHT?

A. TEN OR TWENTY SECONDS AFTER.

Q. SHE BLEW TWO WHISTLES?

A. YES, SIR.

Q. DID THE "OCKLAHAMA" ANSWER?

A. NO.

Q. THEN WHAT HAPPENED?

A. He rung down to his engine and stopped his engine, THE "OCKLAHAMA," BUT DIDN'T ANSWER THE WHISTLE.

Q. Did he stop the engine and back, or just stop it?

A. He stopped it.

Q. Were there any other whistles?

A. No.

(Record, Vol. I, p. 368.)

Q. Was the "Ocklahama" torn loose from her lines by the collision?

A. Yes.

Q. What lines did she have out on the "Thielbek"? Describe them.

A. She had two stern-lines, a head-line and two breast-lines.

Q. Five altogether?

A. Yes, sir.

Q. Describe what they were in way of their weight and strength; whether hemp or steel or manilla.

A. I don't know what it was.

Q. You don't know what they were composed of?

A. No, only that they were of wire and rope.

Q. Where were they made fast to the "Thielbek"?

A. Two over the stern, made fast on the poop; one aft, just before the poop, amidships, and one goes forward about to the main-mast, and one was over to the mizzen-mast on the rail—on the stanchion.

(Record, Vol. I, p. 370.)

Q. Now, at the time of the collision, where were you in relation to the "Chinook"; was she on your port?

A. She was on the port side; we was close to the stern of the "Chinook," about 150 feet off.

(Record, Vol. I, p. 372.)

Q. Now, then, if I understand, this is your poop-rail and this is your bulwark-rail (indicating with pencils and a knife on table). If I looked athwart your ship, there would be the wheel-house of the "Ocklahama" to my right hand?

A. Yes, sir.

Q. Not more than an eighth of a point ahead of that line?

A. Yes, sir.

Q. AND YOU DIDN'T CHANGE FROM THAT POSITION ALL THE TIME TO THE HAPPENING OF THE ACCIDENT?

A. NO, I ALWAYS STOOD THERE.

Q. ALL OF THE THINGS YOU HAVE TOLD COLONEL WOOD YOU SAW, ALL OF THE LINES YOU SAW, AND WHAT YOU HEARD, WERE SEEN AND HEARD BY YOU FROM THAT POSITION AND NO OTHER?

A. YES, SIR.

Q. IS THAT CORRECT?

A. YES, THAT IS CORRECT.

(Record, Vol. I, p. 378.)

Q. In other words, so far as you could see from where you were, as a navigator, there was plenty of room for you to have negotiated a passage on either side, wasn't there, and get through?

A. There wasn't much room, but room enough for passing.

Q. *If you had been a close navigator you could have gone through on either side?*

A. Yes.

Q. *That was true during all the time you came up the river after she got clear of the dredge, wasn't it?*

A. Yes, sir.

(Record, Vol. I, p. 386, 387.)

Questions by Mr. Minor:

Q. Mr. Eggars, how was the "Thielbek" swinging before the collision?

A. She was going easy to the port.

Q. How long had she been going in that course?

A. She was going that way a short time before we heard the two whistles of the steamboat, easy to the port.

Q. Did she change her course after the whistle?

A. Yes, she was going more to the port after we heard the two whistles.

Q. After she took that new course, did she change the course at all?

A. Yes, he changed the course and let her go easy as far as she could go and then held her up a bit.

Q. Before the two whistles blew, how was the "Thielbek" swinging?

A. Easy to the port.

(Record, Vol. I, p. 387, 388.)

QUESTIONS BY MR. WOOD:

Q. Mr. Eggars, Mr. Minor asked you a question about the "Thielbek" and the "Ocklahama" being on an easy port-swing. Do I understand that was all the way coming up the river, or only at the time of the first whistle of the "Fagelund"?

In other words, when did you take the port-swing?

A. We took the port-swing shortly before the two whistles came.

Q. Before the two whistles?

A. Before the two whistles we were going easy to the port; after the two whistles we were going more.

Q. Going more to the port after the first two whistles of the "Fagelund"?

A. Yes, sir.

Q. Then did he make any further change to port?

A. Yes, she was going easy all the time the whole way along.

(Record, Vol. I, p. 396, 397.)

HERMAN OEHRING, called as a witness for the libelants, being duly sworn, testified as follows:

Questions by Mr. Wood:

Q. When did you first see any lights indicating vessels ahead?

A. I was on the forecastle-head and looked out.

Q. *How long after you had been in motion, going?*

A. *About fifteen to twenty minutes.*

Q. In what relation were you at that time to any point on the Astoria shore? Have you got any point you could say you were opposite?

A. *A little time before I went on the forecastle-head we passed a red light ashore. I noticed that.*

Q. That was a little time after you came on the forecastle-head?

A. While I was going up to the forecastle-head I noticed it.

Q. When did you go on the forecastle-head? *How long had you been running before you went there?*

A. *Fifteen to twenty minutes.*

Q. What lights did you see ahead?

A. I see a ship lying at anchor; the anchor-lights on the ship.

Q. Where were you?

A. On the forecastle-head then.

(Record, Vol. I, p. 407.)

Q. How far off the "Thielbek" was the "Chinook"?

A. About 150 to 200 feet.

(Record, Vol. I, p. 411.)

The record discloses at pages 421 to 439, inclusive, the most astonishing testimony from the lookout GERHART GERDES, who testified that he didn't see any red light ashore (record p. 428) and he saw no steamer lights and in fact he did not see much of anything (record pages 433 to 435.)

CAPTAIN I. TURPPA, a witness called on behalf of Knohr & Burchard, being first duly sworn, testified as follows:

Direct examination, questions by Mr. Wood:

Q. Captain, what whistles did you hear, if any, prior to the collision?

A. I heard two whistles.

Q. From what boat?

A. I took it to be the "Thode Fagelund." She has been here several different times and I knew her whistles, and the night before, I came down that vessel and the "Thode Fagelund" overtook us and I have heard her whistle so many times I recognized her, although I was half asleep.

(Record, Vol. I, p. 678.)

Q. Can you tell at what time you heard the bell to back, relating to the time you heard the whistle of the "Thode Fagelund"?

A. Well, I couldn't say how long it was, after the "Thode Fagelund" had blown her second whistle, and we had answered her second whistle. I won't say. I won't state no length of time.

Q. Did you drop asleep at all after you heard the whistle from the "Ocklahama" up to the time of the collision?

A. Well, I was half asleep; half asleep and half awake at all the time, but I wouldn't—many a time when I meet the vessels on the river, we

slow down, and sometimes we stop. Now, the swells of some boats, it makes it necessary for us to do this, in order to stop our lines carrying away, and I don't think nothing more about it than just something of that kind. He just slowed down the speed, probably he was afraid of a swell.

(Record, Vol. I, p. 689, 690.)

Q. Now, what was the condition of the tow lines of the "Ocklahama" that night?

A. We had a wire towline, inch wire.

Q. How many lines was the "Thielbek" lashed to the "Ocklahama" with?

A. We had two stern lines, two breast lines, one tow line and one head line.

Q. Tell the Court about what were the sizes and nature or material of these lines?

A. Our manilla lines are seven inch lines. Head line, breast lines and stern lines, and then they have a wire pennant on the end of each one of them, probably it was five or six fathoms of wire. I think it is three-quarters, either five-eighths or three-quarter wires; wire pennants on the end of each one of them.

Q. And your tow line is how large?

A. Our tow line is an inch wire.

Q. Inch wire?

A. Yes, sir.

Q. These manila lines, as I understand, you

measure by circumference, seven inches being seven inches in circumference?

A. Yes, sir.

Q. WERE YOUR LINES PARTED?

A. YES, THE LINES WERE PARTED. When I went out to the pilot house, the head line was still intact.

Q. The head line was intact, and the others were parted?

A. Yes.

Q. And at what place on the lines were they parted? Do you remember?

A. Different places; some very close to that wire pennant, and some further away. I couldn't positively state now.

(Record, Vol. I, p. 692.)

Q. But what I mean, Captain, if you were in doubt as to her position, because of the manner in which the range lights appeared to you, and the fact that she was beyond the "Chinook" from you, what, in your judgment, would you have done?

A. I don't know as I have any reasons to be in doubt if I see her green light, and she blows me two whistles. I don't see any reason why I should be in doubt to blow her two whistles.

(Record, Vol. I, p. 697.)

Q. You know the "Thielbek," and you know the "Ocklahama." In what space can the "Ocklahama," going full speed astern, stop the "Thielbek," if the "Thielbek" and the "Ocklahama," at

the time when you undertook to back, were proceeding at a speed of about six miles an hour?

Mr. BRISTOL: As to that I object, because there is no evidence that the "Thielbek" and the
(Record, Vol. I, p. 699.)

"Ocklahama" were then, or at any time, proceeding at six miles an hour.

Mr. MINOR: That is an allegation of the libel, your Honor, and I have to meet everything in the libel. The libel of Mr. Snow says that.

Q. In what distance could they stop?

A. Well, I couldn't say how many feet, or how many—but I know that I tried her here in the Portland harbor, and it took me five minutes to stop from full speed astern.

(Record, Vol. I, p. 700.)

Cross examination, questions by Mr. Snow:

Q. Captain, you were half asleep and half awake from the time you heard the first whistles of the "Ocklahama" up to the time of the collision?

A. Probably up to the time I heard those trouble distress whistles of the "Thode Fagelund."

Q. At the time you heard what you call the distress signals, and what we call the danger signals, Captain—that is what you mean by distress signals, the danger signals?

A. Yes, sir.

Q. Repeated short blasts of the whistle?

A. Yes, sir.

Q. You were half asleep from the time you heard the first whistle of the "Fagelund" up to the time you heard the danger signals?

A. I was awake enough all the time; I knew we were meeting the "Thode," and I knew—when I was at the dock the night before, I heard something about the pilot going aboard the "Thode Fagelund" and I just thought now the "Thode Fagelund" is going to sea, when I heard the whistles.

Q. When you got down the night before, you knew that the "Fagelund" was going to sea the next morning?

A. I heard it at the Astoria dock, when I was there telephoning for my orders.

Q. Now, are you able to state the time between the first two whistles of the "Thode Fagelund," and

* * * * *

(Record, Vol. I, pp. 703, 704.)

Q. Now, if she were going at seven miles an hour at the time you heard this call for slow speed, how long would it take her after a bell to stop, to stop the momentum of the vessel, of the "Thielbek"?

A. STOP HER HEADWAY ENTIRELY?

Q. YES.

A. OH, ABOUT FIVE MINUTES, APPROXIMATELY.

Q. ABOUT FIVE MINUTES?

A. YES, ABOUT.

Q. YOU THINK IN ABOUT FIVE MINUTES, IF SHE WERE GOING AT SEVEN MILES AN HOUR, YOU COULD STOP THE VESSEL, COULD YOU?

A. I believe I could stop her. I TRIED IT HERE IN THE PORTLAND HARBOR, JUST TO SEE HOW LONG IT WOULD TAKE. IT TOOK ME FIVE MINUTES TO STOP.

COURT: At what speed?

A. WE WERE GOING AT FULL SPEED.

Q. Did you have a tow with you when you tried to stop her?

A. I had the "Thielbek."

Mr. BRISTOL: Yes, tried to stop her in the Portland harbor, he said.

COURT: You had a tow.

Mr. BRISTOL: This same ship, the "Thielbek," he told you.

COURT: This same boat in the harbor.

Mr. SNOW: Oh, I see. And were going at full speed, and stopped her in five minutes?

A. Yes.

(Record, Vol. I, pp. 713, 714.)

Q. That is your second course. The first course would be up to this light?

A. Well, we generally turn around.

Q. You come up to this light, and take that as the point of the departure?

A. Yes.

Q. Then come to the Elmore Cannery light?

A. Outside of that.

Q. Outside, but keep in the fairway out here?

A. Yes, sir.

Q. And then run from the Elmore light to this flash-light buoy?

A. No, I generally steer so as to reach way up here, thousands of lights here, but generally the street line, two lights in a line, I generally steer by, and come up about abreast of Callender dock, and commence to haul up the river.

Q. You really don't take any bearing on flashlight buoy No. 2?

A. No. I don't generally go up in there. I steer right in the middle of the channel. That is the reason I take this street line up here, because I can get in the middle.

Q. In the middle of the fairway?

A. Yes.

Q. Your natural way, if you had been taking the "Thielbek," and I presume that is the way she was going that night—I am assuming if you had it you would take the point of departure from this red post light, and then steer for the Elmore Cannery dock?

A. Yes, sir.

Q. Then go from there on the range for these arclights up the hill?

A. Yes.

Q. And when you get off here by Callender dock, would set up for Tongue Point?

A. Would make a kind of a swing with the ship; we don't swing fast.

(Record, Vol II, pp. 740, 741.)

Q. When you came down that night, did you go between the Gilman Light and the "Thode," having the "Thode" on your starboard hand, or on your port hand?

A. As near as I can recall, I did.

Q. You had the "Thode" on the starboard side coming down?

A. Yes, had her on the starboard, my right-hand side going down.

(Record, Vol. II, p. 753.)

H. F. CAMPION, a witness called on behalf of the Libelant Wilhelmsen, being first duly sworn, testified as follows:

Direct examination, questions by Mr. Bristol:

Q. Mr. Campion, what is your business?

A. Superintendent towage and pilotage for The Port of Portland.

(Record, Vol. II, p. 1004.)

Q. That is to say, what I want to get at now, —just follow me and we won't misunderstand each other—this paper that you have shown me

called The Port of Portland Tariff No. 1 was the document that you had in use applying to all towage services in 1913, was it?

A. Yes, sir.

Q. And wasn't any other?

A. No.

Q. That applied in August, 1913?

A. No.

Q. And it would be accurate for us all to take these as the Rules and Regulations of the towage and pilot rates and dry dock rates, and that sort of thing, as shown in this paper, as obtaining of the time when we reached the date of August 23rd and 24th, 1913?

(Record, Vol. II, p. 1008.)

A. Yes, particularly the pilotage and towage. I don't have so much to do with the dry dock, but I think that is the same tariff.

Q. And if there were any changes?

A. I don't know of any changes, only what I have put here.

Q. In pen and ink?

A. Yes.

Q. And you made those notations when? Lately?

A. I made them since April 30, 1914.

Q. Since April 13, 1914. So there were no changes in this paper up to the time—the date of August, 1913?

A. No.

(Record, Vol. II, p. 1009)

Q. Now, as to the entries in that log, the same is true, is it not, with reference to your getting the particulars of the accident?

A. Yes.

Q. That is, you had to rely upon your captain's report, Libelant's Exhibit 11, which you saw before?

A. Yes, sir.

Q. How did you find out, in this Casualty Report,—did the first you knew of the item, "All the steamer 'Ocklahama' lines carried away, consisting of one wire tow line, one rope head line, two rope breast lines, and three rope stern lines"—was the first you knew of it only after the Casualty Report came to you, or did you know it from anyone on board ship?

A. No, I took it—as soon as I had a chance to talk with the crew, I found out that their lines carried away. I talked to the pilot, and talked with the captain probably before that report was actually made out.

Q. Probably before. Did you give any directions as to how this Casualty Report was made out?

A. Nothing more than to ask for a casualty report in detail, covering the accident, the collision.

Q. And in connection with that, this statement made by Mr. Archie L. Pease, Jr., pilot steamer "Ocklahama," which is a part of this

exhibit, I believe you said was the report you received from him at that time?

A. Yes, sir.

(Record, Vol. II, p. 1061, 1062.)

Q. Showing you the book, on page 2, again for identification, I read to you: **Foreword. The Port of Portland Commission**, in presenting this brochure to the shipowning public, has endeavored to give only facts obtained from the most reliable sources, together with exact data relating to this port's conditions and charges."

A. Yes, sir.

Q. Is that right? That is the way it was issued, wasn't it?

A. Yes, sir.

Q. Now, do you know whether that book was put out—it also has in it the towage and pilotage rates, and some other stuff—do you know whether that book was put out generally by The Port of Portland for the ship owning public?

A. I think it was.

Mr. BRISTOL: I offer this in evidence.

Marked "Libelant Wilhelmsen's Exhibit 13 (Campion.)"

(Forward and Shipping Directions from Wilhelmsen's Exhibit 13.)

FOREWORD.

The Port of Portland Commission in presenting this brochure to the ship owning public, has endeavored to give only facts obtained from the most reliable sources, together with exact data relating to this port's conditions and charges.

Any more information required regarding shipping matters or commercial conditions of this section will be cheerfully supplied upon application, either to The Port of Portland Commission, City Hall, Portland, Oregon, or the Portland Chamber of Commerce, Fifth and Oak Streets, Portland, Oregon.

THE PORT OF PORTLAND.

Portland, Oregon, U. S. A., Jan. 1, 1912.

THE PORT OF PORTLAND.

The intent of the law incorporating The Port of Portland is, to maintain a deep, safe channel, for the largest vessels, from Portland to the sea, and to cheapen port charges.

The Commission has, by the various acts of the State Legislature, been authorized as follows:

First. To build and operate dredges and dredge machinery, and build dykes, for the improvement of the harbor and of the ship channel between Portland and the sea.

Second. To inaugurate and maintain a towage and pilotage service between Portland and the sea.

Third. To build and operate a dry dock.

Fourth. To establish rules and regulations for the navigation of the harbor, and of the Willamette and Columbia Rivers between Portland and the sea.

Fifth. To sell bonds and levy taxes for the carrying out of the various objects named above.

(Record, Vol. II, p. 1072.)

As to Turppa's responsibility, Campion testifies:

Q. I am not speaking about the fact as to his being off watch. I am talking about this rule you gave me, which was, you looked to the captain as the responsible person to look after the tug and tow. Now, is that true, and if true, was it true on this particular night?

A. Well, yes, we always—

Q. All right. That is all.

Mr. MINOR: You always what? Finish your answer.

COURT: Go ahead and finish.

Mr. BRISTOL: Yes, finish it.

A. You walked right away, so I didn't want to talk while you were going.

Mr. BRISTOL: Go ahead and finish, if you have more to say. I understood you answered the question.

A. I will go back and say we hold the captain responsible all the time.

Q. That is all I want to get at.

(Record, Vol. II, p. 1098.)

Q. Turppa was mate, as I understood you to say until some time in April, 1913, mate on the "Ocklahama"?

A. Pease.

COURT: Pease.

Q. I understood him to say that until some time about April, 1913, Turppa was mate, and somebody else was captain, and he left in April, 1913.

A. I said Captain McNally was master of the "Ocklahama."

Q. About some time in April, 1913?

Mr. BRISTOL: And Turppa was pilot?

A. And Captain McNally asked for a lay-off.

Q. And Turppa was pilot?

A. Turppa was pilot.

Q. And at that time, while those two men were in charge, was Pease on the "Ocklahama"?

A. Yes.

Q. In what capacity?

A. Mate. Turppa then went captain, and Pease went pilot. Then Captain McNally, the last day, I believe, of April, left the service entirely, and Captain Turppa went from pilot to master, and Mr. Pease went from mate to pilot. That is, he had been pilot for a few days.

Mr. SNOW: That is April, 1913?

A. 1913.

(Record, Vol. II, p. 1105.)

Q. I will ask one more question. As a matter of fact, your charges for pilotage of the "Thode Fagelund," were based upon her tonnage register, and her draught?

A. Yes, sir.

Q. Exceeding the amount that you would pay Nolan for pilotage service of that vessel?

A. Yes, sir.

Q. In other words, you make a profit off the pilotage business, don't you?

A. Well, not at the end of the year.

(Record, Vol. II, p. 1111.)

ARCHIE L. PEASE, Jr., a witness called on behalf of Libellant Wilhelmsen, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Bristol:

Q. Mr. Pease, you are the Archie Leroy Pease, Jr., that has been mentioned in this case so much since we started, are you not?

A. Archie L. Pease, Jr., yes, sir.

Q. Pilot of the "Ocklahama"?

A. Yes, sir.

(Record, Vol. II, p. 1112.)

Q. You were mate on the "Ocklahama" with pilot's papers for about a year and a half, and then this change between McNally and Turppa took place. That was April, 1913?

A. I think it was.

Q. And since that time, you have been pilot on the "Ocklahama"?

A. Yes, sir.

(Record, Vol. II, p. 1114.)

Q. Now, the next place you started to change the course, if any, was it above or below the Calender dock?

A. Was, I should say, a little bit below.

(Record, Vol. II, p. 1128.)

See in this connection Libelant's Exhibit 14 (record page 1422.) This was the position four or five minutes after he passed Elmore light. (Record, page 1133.)

PEASE further testifies:

Q. Now, for instance, you say here "head-on collision with S. S. 'Thode Fagelund,' opposite O. R. & N. dock, 3:25 a. m."

A. Yes, sir.

(Record, Vol. II, p. 1139.)

PEASE then identifies his report to the United States Inspectors, so much thereof as is now material follows:

After I had been backing full speed for between three and four minutes *and had a great deal of the headway off the bark*, the steamer dropped her anchor and a few seconds later the steamer and the bark came together head-on, tearing a large hole in the steamer on her port

side a few feet from the bow and driving the bark's anchor through a few plates and denting a number of others on both sides of her bow.

This collision occurred at about three twenty-five in the morning abreast the O.-W. R. & N. dock.

I got the two vessels apart in about one hour and a half, and as the steamer said she needed no assistance I left her anchored there.

Respectfully,

A. L. PEASE, Jr.

Pilot Steamer "Ocklahama."

(Record, Vol. II, pp. 1146, 1147.)

Contrast this with the statement made to his owners, The Port of Portland:

After I had been backing full speed for between three and four minutes *and had most of the headway* off the bark, the steamer let go her anchor and a few seconds later the bark and the steamer came together head on.

(Signed) A. L. PEASE, Jr.,

Pilot Str. "Ocklahama."

(Record, Vol. II, p 1047.)

Afterwards Archie Leroy Pease was called as a witness on behalf of Knohr & Burchard and among other things testified as follows:

Questions by Mr. Wood:

Q. Mr. Pease, you are the Archie L. Pease, the same one that testified before, and you are usually called Roy Pease, are you not?

A. Yes, sir.

Q. What is your age?

A. Born February 10, 1886.

(Record, Vol. II, p. 1178.)

Q. What was your reason for not answering the first two whistles?

A. Well, she was coming—she was just the other side of the “Chinook.” I figured that she would be out from the “Chinook” in just a matter of a few seconds. I could see the outline of the “Chinook” easily. Therefore, when she came out I would be able to see the outline of her, and I thought it was good action to wait, and see her outlines for sure, and then see whether I could pass her according to the two whistles.

Q. As she requested?

A. Yes, sir.

But as I understood you—

A. You see it was an unusual whistle. It was an unusual signal. It was a signal that should not have been given unless there was some reason for it with the other vessel.

(Record, Vol. II, pp. 1184, 1185.)

Q. Now, you said that the whistle that you received from the “Fagelund” was an unusual one. I would like to ask you what course you had intended to pursue, before you saw the “Thode,” as you went up the river; the course you intended to follow, and why, if her whistle

was unusual, you departed from it and assented to her request.

A. Well, the course that I intended to pursue, was following the docks around, giving the vessels which were anchored there a wide berth.

Q. Giving the vessels that were anchored where?

A. Where the "Thode Fagelund" had been anchored, and where the "Chinook" was anchored. I intended to give them a wide berth. They blew me two whistles, which was an unusual whistle; evidently they had a reason for it. They should have a reason for it. Anyway, I saw that I could steer so as to give them plenty of room for their whistles, if they wanted that. I gave it to them, not knowing their reasons for wanting it, but seeing I could help them out and give them room, so they would have plenty of room to pass on that signal.

(Record, Vol. II, pp. 1188, 1189.)

Q. Now, as I understand, you saw the "Thode" before she whistled?

A. Just before she whistled.

Q. Now, that word "just"—

A. Means very shortly.

(Record, Vol. II, p. 1208.)

Q. I don't want to banter words with you, but what do you mean by "just"? I might mean that as very close, as much as a man might count twenty-five, and you might think almost instantly. What do you signify by the word "just"?

A. I looked and saw the lights, and came to the conclusion it was a vessel under way, and about that time she whistled. That is, I should say, probably from the time she whistled, and the time I saw her, was a few seconds.

(Record, Vol. II, p. 1209.)

Q. Just a moment. Now, then, I am trying to direct your mind to that testimony when you first saw the "Thode Fagelund." In that position, where you first saw her, she hadn't blown any whistles and you were approximately 150 feet off the shore line, or dock line of Astoria, heading for the Gilman Buoy. Why didn't you blow one whistle and hold your course?

A. As I said before, if I had blown the first whistle, I would have blown one whistle.

Q. Yes. Now, I want to ask you why you didn't blow that one whistle and hold your course when you had 700 feet to get through there?

A. Well, that is just a matter of—you know lots of times when we first sight a vessel, and even when we know our course, we don't always blow the whistle the minute we sight her.

Q. That may be true.

A. As I told you, it was a very short time, a matter of time while you count ten, from the time I saw her until she blew her whistles.

Q. All right. Now, in that time that you count ten, there was time for you to blow your one whistle, was there not?

A. Yes, there was time for me to blow my one whistle.

Q. All right. Now, I say why did you not do it?

A. When a man sees a vessel, he will usually count—that is he will usually wait that length of time before he blows any whistle at all.

Q. Well, is that the only reason you had for waiting?

A. I had no other reason for waiting. We were quite a distance apart, and he was off on my port side, and I knew that he was coming down, and I knew that, and the chances were he was going to swing around the stern of the “Chinook.” When he comes aft the stern of the “Chinook,” then would be plenty of time to give him a one whistle signal.

Q. So you waited and didn’t give him the one whistle signal?

A. I didn’t give him the one whistle signal at that time, no, sir, when I first sighted him.

Q. Then why do you say his whistle was wrong?

A. Because he had me on his starboard bow—I didn’t say it was wrong.

Q. You say it should not have been given?

A. Unless he had a reason for it, I said.

(Record, Vol. II, pp. 1224, 1225.)

Mr. MINOR: I object to that, your Honor. That is governed entirely by the law, not by what this witness may say. The law in that re-

gard, your Honor, is different from what Mr. Bristol states it.

Mr. BRISTOL: We will argue that, your Honor.

Mr. MINOR: That is true, but what I want to say is this: The law, as I understand it, is that it is not the duty of the vessel so signaled to get out of the way of the other one. It is the duty of the other vessel to get out of the way of the one she has signaled.

Q. Very well. Let him answer the question, anyway, to see his judgment about it.

Q. (Read.)

A. Not necessarily. If when—

Q. Why not?

A. *When he blows a signal, he means that he can get by me if I hold my course, if I do nothing. I am not supposed to do anything against him, knowing that course, that is, if I answer two whistles, I am not to go to my starboard. I can hold my course, or go to my port.*

Q. You mean to tell me, as a pilot on this river, that when you meet a vessel coming downstream, and you are going up, and she first signals you with two whistles for a starboard passing, that you can hold your course?

A. Yes, sir.

Q. You state that upon your knowledge as a pilot, do you?

(Record, Vol. II, p. 1226.)

A. *I say, if I am holding a course, and a man blows me a signal, I can hold my course.*

Q. Is that the reason for saying Mr. Nolan gave you the wrong signal?

A. No, I don't think Mr. Nolan could have passed me if I had held my course, but I was willing to give him room and I gave him room.

Q. You have no other reason for saying that the two whistle signal was wrong, other than you have given, have you?

A. I don't say the signal was wrong. I said it *was an unusual signal.*

Q. Then I will put it this way to you—

Mr. SNOW: What do you mean by that?

Mr. BRISTOL: I will find out what he means if I can.

Q. Why did you answer the two whistles of the "Thode Fagelund" if it was a signal that should not have been given?

A. It was an unusual signal. I did not say that *it was a signal that should not have been given.*

Q. You tell me that the starboard to starboard passing signal is unusual?

A. *A starboard to starboard passing signal is unusual in passing vessels in these positions.*

Q. Why?

A. For the simple reason one vessel has to cross the bow of the other vessel.

(Record Vol. 2, p. 1227.)

Q. Now, isn't it true, Mr. Pease, and don't you know it to be a fact, that as a pilot in these waters, that the Pilot Rules practically prescribe—and in order that you may understand what I mean and not be confused, I read to you, directing your attention, in view of your answer, to Article 22 of the Pilot Rules. Have you got them?

A. I have them.

Q. You have them there, have you?

A. What page is that?

Q. On my copy it is page 9.

A. Which Article?

Q. Article—well, along there, Rule 9.

A. Yes.

Q. Article 21. Now, look at it.

A. Yes, sir.

Q. "Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed."

A. Yes, sir.

Q. Now, you maintain, then, as I understand it, that Mr. Nolan had no business to give you the two whistle signal, as it was up to him to keep out of your way; is that right?

A. I don't say he had no business to give them.

Q. Well, in view—

A. I say, that when the vessels were laying in that position, Mr. Nolan or I, whoever happened to give the first signal, should have given one whistle, and in the case of that position, it was Captain Nolan's place, it was the "Fagelund's"

place to keep out of my way.

Q. Well, I am putting it the other direction. I am putting it on the theory that Mr. Minor takes. He says, and stated to the Court here, that he was going to claim that you were the privileged vessel, and your testimony seems somewhat to indicate you have that idea by saying that the "Thode" should not have given the signal that she did. I have called your attention to the rule that you could rely upon in support of your point, and ask you to question why you didn't hold your course?

A. I told you because she blew two whistles.

Q. Well, suppose she did. If that was wrong, you didn't have to obey it, did you?

A. I thought she had a reason for it, or she wouldn't blow it, and I thought I would help her out, yes.

Q. Then you blew two whistles assenting to that, saying you would execute the maneuver the "Thode Fagelund" invited you to, didn't you?

A. Yes, sir.

Q. You had plenty of room to do it too, didn't you?

A. Yes, sir.

(Record Vol. 2, pp. 1228, 1229.)

Q. I read this part of it to you: Rule 7. "When two steam vessels are approaching each other at right angles, or obliquely, so as to involve risk of collision, other than when one

steam vessel is overtaking another, the steam vessel which has the other on her own port side, shall hold her course and speed."

A. Yes, sir.

Q. And continuing the rule, I will read on: "And the steam vessel which has the other on her own starboard side, shall keep out of the way of the other, by directing her course to the starboard, so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed, or stop or reverse. If, from any cause the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent, by blowing the danger signal, and both steam vessels shall be stopped and backed, if necessary, until signals for passing with safety are made and understood."

A. Yes, sir.

Q. Do you mean that you complied with that rule?

A. Not with that rule.

Q. Why not? You were approaching obliquely were you not?

A. Yes, sir.

Q. Why did you not comply with that rule?

A. For the same thing that I answered before. I got two whistles.

Q. I am talking about before you got the two whistles.

A. Before I got the two whistles, there was no whistle given.

Q. Well, why didn't you comply with that rule?

(Record Vol. 2, pp. 1233, 1234.)

A. There was no rule to comply with until the signals are given. That is—

Q. Then your attitude, as I understand it, Mr. Pease, seems to maintain that you had nothing to do until Mr. Nolan blew, and then you governed your course accordingly; is that right?

A. Or until I had blown.

Q. Why didn't you blow a whistle, if you wanted to hold your course the way you were going, and follow up around, why didn't you blow him one whistle?

A. I would have, if I had had a little more time. There is no hurry about blowing a whistle.

Q. Well, if there was no hurry about blowing a whistle, you had plenty of time, didn't you?

A. If I had thought he was going to blow two whistles, and had known the time he was going to blow them, I think I would have blown one whistle before he had a chance.

Q. You say—

A. After he blew his two whistles, I couldn't blow one whistle, without blowing the danger whistle and one whistle.

Q. But, my dear friend, you waited until he blew you two whistles, didn't you?

A. Yes, sir.

Q. If you didn't want to consent to that signal, you could have refused, under that rule, when he blew the first two whistles, couldn't you?

A. Certainly, and could have refused that on his second whistle.

Q. Why didn't you refuse that?

A. Because I considered I could pass on a starboard passing.

Q. Well, if that be true, why should not—why *wasn't it proper for the "Thode Fagelund" to give two whistles?*

A. *I guess maybe it was.*

Q. All right.

A. I didn't say it was improper. I just said it was an unusual signal.

Q. Well, there is nothing unusual about a man's signaling the course he wants to go, is there?

A. There is, in a way.

Q. Why?

A. He is supposed to give when the vessels are *in that position, a one whistle as the signal, he is supposed to give that unless he has another reason. If he has another reason he should—if he has a reason for that other passage, it is all right.* It is nothing against his signal, but as a rule, when vessels are meeting that way they usually pass on a port signal, port passing. That is why I say it was unusual. It is not—it is done.

(Record, Vol. 2, pp. 1235, 1236.)

Q. Now, in view of that rule, I would like you if you can, and I don't want to confuse you, nor do I want to be importunate to you, but tell me why it is you still say that the whistle of the "Thode Fagelund"; that is, I am speaking of a starboard passage; the whistle of the "Thode Fagelund," the two whistles, were not answered by you? Then an interval of time comes, and she blows two again, and then you assent to it---do you still claim that signal should not have been given?

A. No, I don't say that whistle should not have been given.

Q. All right.

Mr. MINOR: He never said that, Mr. Bristol.

A. I haven't said that at any time.

Q. What is that?

A. I said that it was an unusual whistle, but it isn't a whistle that is never given. It is used; it is done that way.

Q. And Nolan did it in just the way it is done, in a number of instances, didn't he?

A. It is done that way in a number of instances, yes.

Q. And you had plenty of clear space when it was given, to have cleared the vessels either side, didn't you?

A. Yes, sir; *that is, when I saw there was room to clear and I say that there was room to clear, I answered his whistle.*

(Record Vol. 2, pp. 1239,1240.)

Q. "Shall keep out of the way of the other by directing her course to the starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop or reverse."

A. Yes, sir.

Q. Now, do you still say Nolan was wrong when he reversed?

(Record, Vol. 2, p. 1243.)

A. I say he didn't have to reverse on that rule there.

Q. You say he didn't have to reverse?

A. Yes, sir.

Q. Why?

A. The stopping and reversing of the engine that it speaks of in this rule is so he can go astern of me, and he has whistled to go ahead of me.

Q. When he reaches a point—when you reach a point as a pilot, in which there is an apparent imminent risk of collision, is it your duty to continue full speed ahead, or to stop and reverse promptly?

A. Well, it is your place to use your judgment.

Q. Then your judgment in this case was to go half speed, and then stop, and then full speed astern?

A. Yes, sir.

Q. And if Nolan executed a like movement,

he would navigate with just as much accuracy as you did, would he not?

A. No, sir.

Q. What?

A. No, sir.

Q. He wouldn't?

A. No, sir.

Q. That is what I want to get at.

A. Not necessarily—

Q. In other words, the maneuver is right for your ship, but it is wrong for his?

A. In that condition, think the chances are, yes. I would like to state the reasons for that.

(Record, Vol. 2, pp. 1244, 1245.)

Q. Don't you claim Nolan should have told you he was backing?

A. Yes, I do.

Q. You do?

A. Yes, sir.

Q. So you didn't have to tell Nolan that you were backing, but Nolan had to tell you that he was backing?

A. In fact, I am supposed to state—when your vessel is going astern, you are supposed to say—to give three whistles. I am supposed to, as well as Captain Nolan is supposed to, and another thing—

Q. But neither one of you did it in this case?

A. Neither one of us did it. *And my reason for not doing it is, of course, as it says here in*

this risks of collision, anybody is allowed to go against them if they want to. In fact, I didn't want Captain Nolen to know I was going astern.

(Record, Vol. 2, p. 1247.)

Q. Now, that was in order, as you said, to give clearance to the vessels in the harbor. What vessels did you mean?

A. I knew that the "Fagelund" and the "Chinook" were anchored there.

Q. *Were they the vessels you had in mind?*

A. *I knew they were anchored there; yes. sir.*

Q. *Those are the vessels you had in mind, are they?*

A. *Yes, sir.*

(Record, Vol. 2, p. 1249.)

Q. All right. Now, then, when she came out from behind the dredge, and she then blew her second two whistles, did she?

A. Yes, sir.

Q. And how far was she from you then?

A. Practically the same distance.

Q. A quarter of a mile?

A. Practically.

Q. Because she couldn't travel very far, of course?

A. No, sir.

Q. In that short time?

A. No, sir.

Q. What time elapsed between the first two

and the second two whistles?

A. About, I should say, a matter of twenty or thirty seconds.

(Record, Vol. 2, pp. 1257, 1258.)

Q. Now, Mr. Pease, you are a son of A. L. Pease, are you?

A. Yes, sir.

Q. And A. L. Pease is a member of The Port of Portland?

(Record, Vol. 2, p. 1263.)

Mr. SNOW: That is not exactly my question, Mr. Pease.

Q. I understood you to say to Mr. Bristol that when the two signals were given, the two whistles blown by the "Thode," which you answered, that you were under no obligation, as you understood under the rules, to change your course? That was correct?

A. In a way.

Q. Did you say that to Mr. Bristol?

A. I don't remember.

Q. Now, give your answer. What did you mean?

A. This is what I mean. Whenever we meet a vessel, we figure on giving a signal that we can get by on, if you hold your course.

Q. You mean you expected him to get by you if you held your course?

A. No, sir; I didn't expect him to get by me. I

knew he couldn't get by me.

(Record, Vol. 2, p. 1265.)

Q. Then you figured out, when he blew two whistles for a starboard passage, you had a right to keep your course, and he would clear you?

A. *No, I wouldn't exactly have a right to do that.*

Q. That is not what you would have us understand?

A. *I have got to avoid a collision. I am put in that position.*

Q. But you are the privileged vessel, according to your theory?

A. *Privileged vessel, yes.*

(Record, Vol. 2, p. 1266.)

RE-CROSS EXAMINATION ON BEHALF OF LIBELANT WILHELMSSEN.

Questions by Mr. Bristol:

Q. Just in connection with Mr. Snow, so Mr. Minor can have it together when he starts. I show you Pilot Book Rules, page 22, fifth situation, which has a diagram on it, showing vessel approaching in the position where you had the "Thode Fagelund" that night.

A. Yes, sir.

Q. *That represents the situation in a general way when you first saw her, doesn't it?*

A. Yes, sir.

Q. And the rule in regard to that is that: "In this situation, two steam vessels are approaching each other at right angles or obliquely, in such a manner as to involve risk of collision, other than where one vessel is overtaking another. *The steam vessel which has the other on her own port side shall hold course and speed*, and the other shall keep clear by crossing astern of the steam vessel that is holding course and speed, or if necessary to do so, shall slacken her speed, or stop or reverse."

A. Yes, sir.

Q. You are familiar with that rule, aren't you?

A. Yes, sir.

(Record, Vol. 2, p. 1268.)

Q. *And the testimony you have given is nevertheless with that rule in your knowledge?*

A. Yes, sir.

Q. And you don't desire to change your statement to Mr. Snow that while there was room for you to have continued on your course in that 700 feet, and to have given one whistle—

COURT: That is the overtaking vessel.

Mr. BRISTOL: No, no, except when overtaking. It was distinguished: "Other than where one vessel is overtaking another." It has a diagram of two vessels approaching obliquely in the fifth situation.

A. Now, that is where you are getting me on

the hold your course proposition.

Q. No, I didn't mean to get you.

A. No, I didn't mean to get me, but that is what I have been trying here in a way. *If a one-whistle signal had been given, I should have held my course.*

Q. Now, there is no other condition. Just let's stop there.

A. Yes.

Q. There is no other condition, is there, than that, when the other fellow blows, that you can hold your course, is there?

A. Well, if I consent to it, I have got to help him out then.

Q. In other words, unless you blow first and hold your course in the fifth position—

A. I have to help him out.

Q. *And the other fellow blows first, then you are bound, under the rules, to give him clearance, aren't you?*

Mr. MINOR: I object to that as not a proper question.

Q. I am willing to argue that with you, Mr. Minor, to the full extent of the law, but I am trying to get at the pilot practice now.

A. *Yes, sir; I have to give him clearance.*

(Record, Vol. 2, pp. 1269, 1270.)

CROSS EXAMINATION ON BEHALF OF THE PORT OF PORTLAND.

Questions by Mr. Minor:

Q. Yes, if you had pursued the course you had pursued up to the collision, and the "Thode" had pursued the course on which she was going at the time she gave the first or second whistle, would there have been any collision?

A. **I DON'T BELIEVE—I THINK THERE WAS PLENTY OF ROOM TO HAVE PASSED,** and given me plenty of room to have passed the "Chinook" which was anchored. **IN FACT, I WENT FURTHER THAN I WANTED TO GO. I WENT FURTHER THAN I SHOULD HAVE GONE. I WENT SO FAR THAT IT REALLY PUT ME IN A DANGEROUS POSITION WITH THE "CHINOOK,"** and if she had held her course, I believe that I wouldn't have had to go anywhere near that far, and still there would have been plenty of room to pass; **THAT WAS MY OPINION.**

(Record, Vol. 2, p. 1273.)

Q. Had you continued on the course which you were pursuing, from the time you answered the passing signal, up to the time of the collision, how far, if at all, would you have passed the stern of the "Chinook"?

A. Well, at the course that I was forced to pursue, I doubt if I would have passed the "Chinook."
IT WAS DOUBTFUL. IN FACT, HERE

WAS THE THING: I STARTED, OF COURSE, AND HAD TO KEEP GOING LONGER THAN I EXPECTED TO HAVE TO GO. In fact—what I mean is, I was crowded. I was crowded until I had very little room, if anything. It was doubtful if I could have gotten by the “Chinook.” I don’t think I could have.

(Record, Vol. 2, p. 1275.)

Q. Now, when were you backing? For what purpose were you backing?

A. At the first part of the time **I was backing more to keep from going ahead so fast; to get the headway off so the other vessel could get by me, and then after she got by me I could swing any way I wanted. I could swing to my starboard so I could be sure and clear the ‘Chinook’ by plenty of room.**

Q. And afterwards, what were you backing for?

A. Afterwards, I was backing up both to get the headway off—to keep from running into the “Chinook” and to get the headway off the vessel, because there was liable to be a collision with the other vessel at that time.

Q. Tell me how does the “Ocklahama” steer with a tow of that kind?

A. Why, good to steer.

Q. I say how does she steer, well or otherwise?

A. Well. That is, I would like to give my statement of that. Now, like steering a sailing

vessel, sometimes we do it to tighten up our lines, or something like that. They can put their wheel hard over one way, and we put our wheel hard over the other way, and we will turn them right around.

Q. Turn them right around?

A. Yes, regardless of their wheel.

(Record, Vol. 2, pp.1276, 1277.)

Q. Now, Mr. Pease, in your judgment, if you had not collided with the "Thode Fagelund," I will ask you *whether you had so much of the headway off the "Thielbek," that in your judgment you would have been able to stop her before you reached the "Chinook"?*

A. *That is doubtful.* What I mean by that is, probably I would have, and probably I wouldn't have.

(Record, Vol. 2, p. 1278.)

Q. I understood you to tell Mr. Minor that at the point where you determined whether or not the *two-whistle passing signal could be exchanged and you did exchange it, that you think that is about a thousand feet away?*

A. *I said that before.*

Q. And then as you proceeded along, there came a time when there was just a vestige of the mast head lights commencing to change. Then they changed more—I mean the mast head lights of the "Thode"—and they changed more until finally the red light came in view. *Now, within*

that thousand feet, and within that maneuvering there, I understand you to say you could have done nothing to avoid a collision—is that right?

A. Under the circumstances, no.

Q. In that thousand feet, with your ship going astern, your towboat, I mean, full speed astern, you could have done nothing to have avoided that collision?

A. And protected myself, no.

(Record, p. 1293.)

Q. But you say you couldn't have executed any manoeuver at that time, to have avoided the collision?

A. No, sir.

Q. All right. If that be the case, what difference would it have made if Nolan blew you three whistles, or any other old number?

A. That would have given me a chance to do something else I couldn't do otherwise.

(Record, p. 1294.)

Q. Then if Nolan blew three whistles, you would have had a chance to do something else?

A. I could.

Q. Because Nolan didn't blow three whistles, you didn't have a chance to do anything else?

A. No, sir.

Q. Is that right?

A. That is right?

Q. That is your full explanation. Now, if you

want to explain that, Archie, I want you to do it.

A. Now, here. If he signaled to me when we were a good distance apart, that is, before he blew the danger signal, which I say—if the danger signal had been three whistles instead of the danger signal, it wouldn't have been time enough for me to do anything, but if he had blown three whistles when we were a reasonable distance apart, then I could not have cross signaled him, but it would have given me a reason to know he is going full speed astern and, as long as he is going full speed astern, he is going to swing to his starboard; I could arrive at it that way. I may blow a danger signal and one whistle; if you are backing up, it is causing you to go to starboard. "Will you let me go on the other side?" *And I couldn't swing and go the other side of him unless I blew the danger signal and one whistle.*

(Record, Vol. 2, p. 1295.)

Q. If the other fellow fails to understand you, or your course and intention, then he shall blow four whistles?

A. Yes, sir.

Q. *That was significant to you, wasn't it, and did mean he didn't understand what you were doing under that rule, wasn't it?*

A. *Well, yes, in a way, but—*

Q. All right. Now, then, why didn't you tell him right then and there, "Now, Nolan, this whole

thing is wrong, that you are getting me in here, and I want to get out of it?"

A. Yes.

Q. Why didn't you do that?

A. He didn't give me time from his danger signal.

Q. Then your claim is that while you were 1,000 feet, or thereabouts, apart, as you have testified, that there wasn't time for you to have executed any move whatever?

A. I say at the time of the danger signal.

Q. You told **Mr. Minor** you were a thousand feet apart at that time.

Mr. MINOR: He didn't say anything of the kind. I asked nothing about that. You got that thousand feet.

A. I said the danger signal was blown, and we came together a couple of seconds after.

Q. That is the last danger signal?

(Record, Vol. 2, p. 1296.)

Q. Let's get how far you were when **Mr. Minor** took you—

Mr. MINOR: I didn't ask about a thousand feet apart.

Mr. BRISTOL: All right. I have a very retentive memory, but I may be wrong. The testimony will show.

Q. Now, you told **Mr. Minor** how far you were apart, when you blew your two whistles?

A. Yes, sir.

Q. What distance was that?

A. Well, I think I said—I am not sure—I think I stated it at about a thousand feet.

(Record, p. 1297.)

Q. In other words, if you can tell me, I want to get at this: When you stopped your engines, and when you went full speed astern, how far were you off that "Thode Fagelund"?

A. Well, I should say maybe about in the vicinity of 700 feet.

Q. And you were going full speed astern at that time?

A. Yes, sir.

Q. And saw her green light then, close in to you?

A. The "Fagelund's" green light?

Q. Yes.

A. It was visible to me.

Q. At that time?

A. Yes, sir.

Q. And you were backing full speed astern at a distance of 700 feet?

A. Yes, sir.

Q. And the "Thode Fagelund's" red light had not yet come into your view?

A. It had not.

Q. Why was it, then, that you couldn't get by her?

Mr. WOOD: On which side?

Mr. BRISTOL: I don't care. Any old side. Let him state.

A. I couldn't get by her—well, at that time—

Q. You were going full speed astern?

A. (Continuing): If she had gone in the position that she was lying in then, I could have gotten by.

Q. Why didn't you right then and there bring the head of your ship up to starboard when you were backing at full speed, swing her to starboard, and slide around the end of the "Thode Fagelund" in the other way? You had 700 feet, you say, to go in?

A. Yes, sir.

Q. Why didn't you do that?

A. Supposing I had done that, and there had been trouble, I say, and protect myself.

Q. Suppose you did do that, was it impossible for you to do it?

A. No.

(Record, Vol. 2, pp. 1298, 1299.)

W. R. ECKHART, a witness called on behalf of Knohr & Buchard, being first duly sworn, testified as follows:

Direct examination, questions by Mr. Wood:

Q. What position did you hold on the "Ocklahoma" on the night of the collision with the "Thode Fagelund"?

A. Watchman.

(Record, p. 1301.)

Q. *What did he do with his engines after he had answered the "Thode Fagelund" two whistles with two whistles?*

A. *He stopped and backed full speed.*

Q. I thought you said he had stopped his engines before the second two whistles.

A. He slowed her down before.

Q. Then as I understand it, he slowed down between the two whistles of the "Thode Fagelund"?

A. I don't know exactly whether it was before or between.

Q. At the time that he received these second two whistles from the "Thode Fagelund," and gave an answer, and swung his boat more to port, as you have described, what was the course of your boat then, in relation to the dredge "Chinook"? How were you headed?

A. We were heading about for the stern of the "Chinook."

Q. Did you vary from that course? Did you change that course up to the time of the collision?

A. I don't think he did.

A. Were you watching.

A. Well, I was watching.

Q. If he did change it, would you know that he had changed it?

A. I guess I would.

(Record, pp. 1308, 1309.)

MICHAEL NOLAN, a witness called on behalf of libelant Wilhelmsen, on redirect examination, testified as follows:

Redirect examination, questions by Mr. Bristol:

Q. Captain Nolan, in view of Mr. Minor's cross examination, and the questions he asked you about the clearance between the ships, I want you now, if you will, please to give the Court the benefit of your knowledge and observation and experience as a pilot as to what the "Thielbek" and "Ocklahama," when you first saw them, could have done to have avoided that collision, if you know.

Mr. MINOR: If your Honor please, I want to object to that question. Of course, it isn't redirect examination, and in the second place, it is irrelevant. The law, as Mr. Bristol correctly said, tells what the duty of the vessels is, what they could do.

COURT: There are conditions where they can't observe them. Conditions might arise where they can't observe them.

Mr. MINOR: What he would have to do, would be to show what the conditions were, not to show what might have been done; show the conditions. The law of the conditions is what fixes their duty.

COURT: I understand that.

Mr. MINOR: If he wants this witness to testify conditions, I have no objections; but if he wants to ask a question, what they could have done, I submit it is not a proper question and not redirect examination; and it is not a proper question,

because the law says what should be done under proper conditions.

COURT: I think he can testify as an expert. Let him answer. He can testify as an expert what good navigation would suggest.

Mr. BRISTOL: That is what I am driving at.

Q. Under these circumstances delineated by Mr. Minor on cross examination, I want you to give the Court the benefit of your opinion, as the witness he has qualified you to be, what, if anything, could be done by the "Thielbek" and "Ocklahama," as a matter of navigation, to avoid that collision, if anything. Tell it in your own way, if you can.

(Record, Vol. 2, pp. 960, 961.)

A. Gentlemen, in telling it, I would like for you to take into consideration, before I would say anything, that it does not reflect on the other man on the other boat.

COURT: Tell the facts about it. Just your opinion, that is all.

A. **AT THE TIME OF SEEING THE "THIELBEK," AND PLACING THE CONDITIONS AS THEY WERE, THERE WAS ROOM TO PASS HAD THE "THIELBEK" BEEN NAVIGATED, THAT SHE WAS UNDER CONTROL TO STOP, HAD AN EMERGENCY ARISEN TO BE STOPPED. THE CHANNEL WAS CROWDED. WHEN I SAY CROWDED, THERE WERE TWO SHIPS IN A VERY SMALL SPACE, AND THE**

CREW OF THE "OCKLAHAMA" KNEW THAT. HAD THE SHIP BEEN NAVIGATED SLOWLY, WE WILL SAY HALF SPEED, SHE COULD HAVE BEEN MANAGED IN A RESPECTABLE DISTANCE FOR BACKING HER AND STOPPING HER, BUT AS IT WAS, WITH FULL SPEED THEREON, HAD THE "OCKLAHAMA" ASSUMED HER RIGHT, AND HELD HER RIGHT, AND BLOWN ONE WHISTLE, IT IS MY OPINION THERE WOULD HAVE BEEN NO ACCIDENT.

(Record, Vol. 2, pp. 961, 962.)

SPECIFICATION OF THE ERRORS.

(Rule 24, Sub. 2-b.)

As set forth in the assignment of errors (Record, Vol. 1, pp. 257 and 281) and this appellant *does now specify* wherein the decree and matters adjudicated by the Court June 24, 1915, are erroneous:

FIRST SPECIFICATION:

THAT THE ACTIONS AND DETERMINATIONS OF THE COURT BELOW WERE ERRONEOUS IN THIS, TO-WIT: THE COURT ERRED IN MAKING THE ORDER OF OCTOBER 25, 1915, CONSOLIDATING ALL FOUR TRIAL CAUSES UPON APPEAL, FOR THE REASON THAT SAID CAUSE 6116 WAS THEN APPEALED TO THIS COURT AND NOT WITHIN THE JURIS-

DICTION OF THE COURT BELOW; AND FOR THE FURTHER REASON THAT NO APPEALS HAD BEEN TAKEN OR WERE PENDING OR HAVE SINCE BEEN TAKEN IN CAUSES 6129, GRACE, AND 6130, DU PONT, AND HAD NOT YET BEEN FULLY DETERMINED; AND FOR THE FURTHER REASON THAT CAUSE 6111 HAD NOT THEN BEEN DETERMINED AND WAS NOT APPEALABLE UNTIL ALL PROCEEDINGS THEREIN HAD BEEN TERMINATED AND PROCEEDINGS IN SAID CAUSE 6111 DID NOT TERMINATE AND BECOME SETTLED UNTIL FEBRUARY 7, 1916, (RECORD VOL. 1, P. 146), *reference being had in support of this specification of error to the Thirty-fourth and Thirty-fifth Assignments of Errors.*

(Record Vol. 1, pp. 282 and 283.)

SECOND SPECIFICATION:

THAT THERE WAS ABUSIVE DISCRETION ON THE PART OF THE COURT BELOW IN DISALLOWING AND WITHOLDING COSTS FROM WILHELM WILHELMSSEN AND DENYING RECOVERY THEREOF AGAINST THE PORT OF PORTLAND ON THE GROUNDS OF THE OPINION OF DECEMBER 14, 1914, FOR THAT THE PORT OF PORTLAND HAD FAILED IN AND HAD ABANDONED ITS DEFENSE OF FAULTY STEERING GEAR AND DEFECTIVE PROPELLOR UPON AND IN REGARD TO WHICH WILHELM WILHELM-

SEN HAD BEEN COMPELLED TO TAKE TESTIMONY; AND BECAUSE THE ENTIRE RECORD IN THE COURT BELOW ON ALL THE CAUSES HAD BEEN PAID FOR BY WILHELMSEN AND WAS BEING USED BY ALL OF THE PARTIES AND HAS SINCE BEEN USED ON THIS APPEAL AND IN THE PROCEEDINGS IN OTHER CAUSES; AND FOR THE FURTHER REASON THAT THE COURT ENTERED IN FAVOR OF KNOHR & BURCHARD, LIBELANTS FOR AND CLAIMANTS OF THE "THIELBEK," AND AGAINST WILHELMSSEN WITHOUT ANY RIGHT OF RECOVERY THEREFOR AGAINST THE PORT OF PORTLAND IN THE SUM OF SOME \$2,300.00, *reference being had in support of this specification of error to the Seventh and Thirty-sixth to Thirty-ninth Assignments of Errors, both inclusive.*

(Record, Vol. 1, p. 283.)

THIRD SPECIFICATION:

THAT THE COURT ERRED IN DECIDING THAT THE STEAMER "THODE FAGELUND" WAS ALONE AT FAULT, *and this specification is based upon Assignments of Errors Second to Twelfth, both inclusive, and also upon Fourteenth and Twenty-ninth.*

(Record, Vol. 1, pp. 265-268; 273-274.)

FOURTH SPECIFICATION:

THAT THE MATTERS AND THINGS SET FORTH ON RECORD PAGE 187, VOLUME 1, WERE ENTIRELY DISREGARDED BY THE COURT, *and this specification is based on the Twenty-eighth Assignment of Error.*

(Record Vol. 1, p. 273.)

FIFTH SPECIFICATION:

THAT THE PLEADINGS OF KNOHR & BURCHARD AND OF THE PORT OF PORTLAND AS IN THIS BRIEF SET FORTH AND IN THE RECORD MORE FULLY SHOWN ARE AGAINST AND DO NOT SUPPORT THE DECREE OF JUNE 24, 1915, AND ALLEGE AND SHOW GROUNDS EXACTLY CONTRARY TO THE CONCLUSIONS REACHED BY THE COURT WITH RESPECT TO THE "THIELBEK" AND "OCKLAHAMA," *and this specification is based on the Thirtieth and Thirty-third Assignments of Errors.*

(Record, Vol. I, pp. 274-276, and the excerpts of the pleadings hereinbefore shown.)

SIXTH SPECIFICATION:

THAT IT APPEARING FROM THE EVIDENCE WITHOUT CONTRADICTION OR CONFLICT THAT THE "OCKLAHAMA" WAS A POWERFUL TUG AND HER TOW EASILY HANDLED AND THE "THODE FAGELUND"

THE BURDENED VESSEL, THERE WAS AM-
 PLE ROOM AND OPPORTUNITY AT ALL
 TIMES FOR PEASE TO HAVE AVOIDED THE
 COLLISION AND AS THE PILOT RULES ARE
 NOT FOR THE PURPOSE OF CREATING, BUT
 OF AVOIDING, RISK OF COLLISION, THE
 COURT ERRED IN ENTERING ITS FINDINGS
 AND DECREE AS IT DID IN DISREGARD OF
 THE PLAIN AND UNCONTRADICTED FACTS
 IN EVIDENCE, *and this specification is based
 upon the Fifteenth, Sixteenth, Twenty-sixth,
 Twenty-seventh, Thirty-first and Thirty-second
 Assignments of Errors.*

(Record, Vol. 1, pp. 269, 272, 275.)

SEVENTH SPECIFICATION:

THAT IT WAS AGAINST THE LAW AND
 AN ABUSIVE DISCRETION OF THE COURT,
 AFTER HAVING CONSOLIDATED THE CASES
 FOR TRIAL, THEN, OVER THE OBJECTION
 OF WILHELMSSEN, TO ALLOW THE SAME TO
 BE SEPARATED INTO DIFFERENT PARTS
 AND PROCEEDINGS AND OVER HIS OBJEC-
 TION ENTER AN INDEPENDENT DECREE IN
 FAVOR OF THE "THIELBEK" IN ITS CASE
 AND ALLOW SAID CAUSES TO BE SEVER-
 ALLY PROSECUTED AT DIFFERENT TIMES
 AND TO DIFFERENT DECREES AND THEN
 TO DENY WILHELMSSEN EQUITABLE, JUST
 AND COMPETENT RELIEF IN RESPECT OF
 THE MATTERS AND THINGS THUS

BROUGHT ABOUT IN A PROCEDURE IN THESE CAUSES WHEREIN THE COURT MADE THE CONDITION OF PAYMENT OF THE AMOUNT FOUND TO THE "THIELBEK" A CONDITION PRECEDENT TO THE RIGHT TO ENFORCE HIS CLAIM OR CLAIMS AGAINST THE PORT OF PORTLAND, *and this specification is based upon Assignments of Errors Eighteenth to Twenty-fifth, both inclusive.*

(Record, Vol. 1, pp. 270 to 272.)

EIGHTH SPECIFICATION:

THAT IT WAS AGAINST THE LAW AND INEQUITABLE FOR THE COURT TO RENDER THE DECREE OF JUNE 24, 1915, AGAINST WILHELMSSEN AS OWNER AND AGAINST HIS SHIP THE "THODE FAGELUND" DIRECTING SATISFACTION *IN REM* BEFORE THE PORT OF PORTLAND DETERMINED BY THE COURT TO BE THE PRIMARY TORT FEASOR *IN PERSONAM* HAD BEEN CALLED UPON TO PAY AND REASONABLE EFFORT HAD BEEN EXERTED TO OBTAIN PAYMENT FROM THE PORT OF PORTLAND, *and this specification is based upon the Thirteenth Assignment of Error.*

(Record, Vol. 1, p. 268.)

NINTH SPECIFICATION:

THE DISTRICT JUDGE HAVING FOUND IN HIS DECISION AND FINDINGS OF NOVEMBER 16th THAT

“The pilot of the “Fagelund” promptly blew “two blasts of his whistle and put his helm “hard-astarboard (where it remained until the “collision) but receiving no answer, stopped his “engines and a few seconds later, estimated to “be ten or twelve, repeated the signals which “were promptly answered by the ‘Ocklahama,’ “but as the ‘Ocklahama’ did not appear to change “her course the ‘Fagelund,’ within five or six “seconds after the exchange of signals, ordered “her engines full speed astern, causing her bow “to swing to starboard, blew four blasts of her “whistle and, after the engines had been backing “for about a-minute-and-a-half, dropped her port “anchor, and almost immediately she was struck “on the port bow a few feet from the stem by “the bow of the ‘Thielbek,’ which plowed into “her some distance almost on a line fore and “aft.”

IT FOLLOWS THAT ALL OF THE ADJUDICATION AND DECISION WHICH IS THE BASIS OF THE DECREE OF JUNE 24, 1915, IS CONTRARY TO AND AGAINST THE EVIDENCE AND FACTS THUS FOUND BY THE COURT AND THAT IT WAS INEQUITABLE AND UNJUST AND AGAINST THE EVIDENCE TO FIND THE “THODE FAGELUND” ALONE AT

FAULT, and this specification is based upon the *First Assignment of Error*.

(Record, Vol. 1, p. 265.)

TENTH SPECIFICATION:

THE RECORD SHOWS THERE WAS NOT THE REQUISITE FINALITY AS TO ALL OF THE PARTIES IN THE DECREE OF OCTOBER 25, 1915, (RECORD, VOL. 1, P. 127) UNTIL THE COURT HAD ENTERED THE FINAL DECREE JANUARY 3, 1916, (RECORD, VOL. 1, P. 137) AND THE PORT OF PORTLAND CANNOT, THEREFORE, BRING SAID CAUSE HERE FOR THERE IS NO JURISDICTION TO SUSTAIN IT AND THERE ARE NO SPECIFICATIONS OF ERRORS FILED BY IT TO SUPPORT AN ATTEMPTED APPEAL, and this specification is based upon the record herein.

ARGUMENT.

(Rule 24, Sub. 2-c.)

Points of Law and Fact Discussed.

The demon "*speed*" is the *real* cause of this collision. The entry in the "*Ocklahama's*" log and casualty report that it was a "*head-on-collision*," and the Court's finding that the colliding blow was given "*in a line almost fore and aft*" demonstrates that Pease kept on farther than he ought to have gone. More especially, when the "*risk*"

of collision" opened, the vessels thus appear "head and head, or nearly so."

The demon "*speed*" was the *real* cause of this collision. Eggars saw the "*Thode Fagelund*" from his position on the starboard (rail) poop deck of the "*Thielbek*" before she whistled the first time. Oehring and Eggars both on the "*Thielbek*" noted the passing of Elmore Cannery light about fifteen to twenty minutes after leaving the "*Thielbek*" anchorage; and they saw it abeam, and noted passing this *red light* before the "*Thode Fagelund*" was seen by Eggars off the starboard bow of "*Thielbek*" before "*Thode Fagelund*" whistled the first time. (Note the evidence hereinbefore set out in this brief.) The "*Ocklahama*" was then going full speed and must have been bearing up to fetch the reach of the river towards Gilman Buoy, or Flash Light Buoy No. 2. Eckhart saw her, too.

The demon "*speed*" caused this collision because the "*Thielbek*" struck the "*Thode Fagelund*" so as to push her steel stern to starboard, and rode up on the steamship with her sharp prow and poked her own starboard anchor through her own starboard bow plates and cut a hole 19 feet wide and 26 feet deep into the "*Thode Fagelund*" and below the water line thus wrecking the port bow hawse pipes of the "*Thode Fagelund*" and stoving in the winch machinery, bow chocks and all the steel stanchions, plates and beams for several feet on the port bow of

"Thode Fagelund." It took "*speed*" to inflict such injury.

The Bailey Gatzert, 170 Fed. 101 at 103.

The Bailey Gatzert, (C. C. A. 9th C.) 179 Fed. 47, at middle of page.

The Santa Maria, 227 Fed. 149.

According to these declarations of law, announced in this *Gatzert* case by this Court, there is no escape from the fact that *speed*, and *speed* alone, did the damage and caused the collision.

Pease had *at least* 700 feet, by his own sworn statement, if not 1000 feet, *as he first said, after the exchange of answered signals*, within which to control and manoeuver his tug and tow.

Pease furthermore says he had so much power that his tug could turn the "*Thielbek*" around even against her own helm. Turppa, master of the "*Ocklahoma*," says he knew it took *five minutes full speed astern* with the "*Ocklahoma*" to stop the "*Thielbek*" and the tug in Portland harbor; which experiment he himself tried with this identical ship.

Pease knew what he had and saw what was before him, but bore up with *full speed* towards a crowded and narrowed passage way, and then lays the blame upon the "*Thode Fagelund*."

He admits without any controversy or contradiction that he regarded himself the "*privileged vessel*" and did not purpose to release what he

thus claimed, or was educated to believe, even against the positive injunction of the *Pilot Rules* if he could get away with that shifting of the burden of responsibility. But he, at the same time, admits *that it was impossible for him to have avoided the collision*. When asked why he did not do so, he answered he had to protect himself. He did so, at other's disaster and consequence. This Court refused its approval in such cases in this Circuit on a previous occasion under circumstances where the navigator *kept on, ran too close* and impinged his vessel on the bow of another:

The Manzanita, 176 Fed. 871.

The Virginian, 217 Fed. 616.

The Santa Maria, 227 Fed. 157.

Under the pleadings (as herein shown) and under *State vs. Turner*, 34 Or. 175, a tug and tow are in fact (in this case) and in law one vessel; *and that under steam*. The navigation of the "*Ocklahama*" was the navigation, therefore, of the "*Thielbek*." It follows that the Port of Portland committed a *maritime tort* by navigating the "*Ocklahama*" so as to bring the "*Thielbek*" and "*Thode Fagelund*" into collision. And it also follows that the *Pilot Rules* control and determine what ought to have been the *safe and prudent* navigation of these vessels.

These rules, among other things, require, that when ships are in the *fifth position*, approaching

obliquely, the ship bearing the other on her star-board side shall pass astern of that other, and *this latter shall hold her course and speed.*

Now, if Pease was to be sustained in claiming privilege under this rule it must appear *from all the facts that when this situation was first presented to him he promptly acted upon it. But he did not. He waited. But he did not signal for a port passage; nor claim the privilege.*

And by the range lights of the "Thode Fagelund" then appearing to Pease and her green light, which he saw for a moment as he states (and then that it was shut out by the stern of the dredge) *he knew the vessels appeared to him on crossing courses and the rules cited demanded of him to blow one whistle and hold his course and speed. This he did not do.*

Moreover, if that act by him did not accomplish and remove the risk of collision, Rule 7, page 20, of the Pilot Rules required him to *absolutely stop his vessel. This he did not do.*

The pilot rules were not created to render a collision possible or to justify a collision when brought about.

The "*risk of collision*" is a state of things which calls for action; and if it arises from uncertainty as to the course of the other vessel or as to the action of those on board, it is to entertain the probability that that vessel has done something which, if in fact she has done it, will produce risk of collision, and then a person who

is aware of the fact of this probability of risk is compelled by law to consider that there is risk. And, therefore, Pease, having a vessel which had to act for risk of collision, cannot be permitted to cut things fine or delay action if there is a reasonable chance at the time of collision that of itself is sufficient to call for immediate action. Indeed, it is held under the English law that it is not even given to wait until a green or red light is seen at night before action is required if the masthead light alters its position, and the vessel so observing is required to deal with it accordingly.

Pease had *become pilot of the "Ocklahama"* in April, 1913, and this collision took place in August, 1913. The father of Pease is a member of the Port of Portland Commission and sits on the board, and also a pilot.

Pease, the younger, is retained in the employment of the Port of Portland, and Nolan's services were dispensed with shortly after the collision happened.

(Record, p. 849.)

Neither *Gerdes* on the "*Thielbek*" nor *Eckhart* on the "*Ocklahama*" knew or observed the significant and impelling things leading to this collision.

When Pease swears that the "Thode Fagelund's" whistle was an unusual whistle and should not have been given, it results that the obligation rested upon the "*Ocklahama*" and

Pease to comply with Rule 1 of the Pilot Rules (page 18 of the Pilot Rules) viz: *To blow one whistle and hold his course and speed, and this Pease did not do.*

It must never be forgotten that Pease saw the "Thode Fagelund" above the dredge, and taking the testimony by its four corners, without any contradiction, Pease saw the "Thode Fagelund" before the "Thode Fagelund" saw him, *and Pease saw the situation first.*

ARCHIE LEROY PEASE, Jr., a witness called on behalf of Knohr & Burchard, having been previously sworn, testified as follows:

Direct Examination—Questions by Mr. Wood:

Q. Mr. Pease, you are the Archie L. Pease, the same one that testified before, and you are usually called Roy Pease, are you not?

A. Yes, sir.

Q. What is your age?

A. Born February 10, 1886.

Q. You said, I think yesterday, that you first saw the "Fagelund" when you were just a little below Callender dock?

A. I should judge that was about the place.

Q. At that time you received the two whistles from the "Fagelund"?

A. Well, shortly after I saw her; matter of seconds; about that time, yes. They blew their whistle just as the green light was shutting out by the stern of the "Chinook."

Q. *So you saw her for an instant or two before she whistled?*

A. *Yes, sir.*

Q. Where was it in relation to the dredge "Chinook" when you first saw her?

A. She was above the "Chinook" coming down.

Q. And about how far away from you?

A. You mean approximately?

Q. Yes.

A. *Oh, about a quarter of a mile.*

(Record, pp. 1178 and 1182.)

Pease, as well as Eggars and Oehring, saw the "*Thode Fagelund*" clear of the dredge "*Chinook*" and in the clear before she whistled the first time. Pease waited; but at full speed.

As already pointed out, Pease actually was when he did whistle "*head and head or nearly so*" with the "*Thode Fagelund*." (Nolan saw both red and green lights of the tug and tow when he whistled the *second time*.) Pease then answered, and *backed full speed astern*. Was he in doubt then?

If so, the Pilot Rules, to which *Pease's* particular attention was called on the stand, provide that when signals given are not understood or are doubtful to the other vessel that vessel shall sound her alarm signals and indicate by new signals her course and purpose; hence, the rules

always designed to prevent and not to accomplish "*risk of collision*" afforded Pease, in the facilities of *quick action* he asserted he had with his powerful tug, and in the clear distance open to him to entirely avoid the "*Thode Fagelund*" for there were 700 feet clear ahead of him and 700 feet between the "*point of contact*" and the docks to his starboard. He says himself, *he could have held his own course up, around by the docks, and avoided collision. Time as well as distance allowed amply for this movement. The rules provided for it.*

But Pease testifies he kept on—went farther than he ought to have gone—went indeed too far; and when he did, he broke and tore loose every hawser on the tow and tug and "*parted all the lines.*" THE SPEED IS SHOWN INDUBITABLY BY THIS FACT AND THE HOLE IN THE "*THODE FAGELUND.*"

Pease in his written reports to his owners and to his superintendent, and to the United States Inspectors, deliberately showed that *he had not stopped, that headway was not off his vessel.*

His own sworn statement, however, with which there is no conflict shows that he answered the "*Thode Fagelund's*" second signal and *then backed full speed astern and gave no signal of his doing so.* Yet, having done so, the impact tore his lines loose, stove in the bows of both ships and ran his tug the "*Ocklahama*" away forward of her previous fastened position. He swears he

was backing thus at *full speed three (3) to four (4) minutes*, and so states in his written reports above mentioned.

Under the ruling of this Court in the *Bailey Gatzert* case, *supra*, this was *speed and too great a speed for safe and prudent navigation. It caused the collision*, and inflicted the injuries resulting in the damages awarded.

The allegations of the Knohr & Burchard libel hereinbefore set out are particularly pertinent to and support the foregoing argument, *and especially allege that the "Ocklahama" was left in charge of a young and inexperienced pilot, and that her master was in his bunk while navigating a narrow passage where ships were likely to be met, and that therein The Port of Portland was at fault; that the "Ocklahama" and tow approached said passage at full speed, and that therein The Port of Portland was at fault; that the pilot of the "Ocklahama," upon receiving the first whistle from the "Thode Fagelund," put her helm to starboard and failed to answer said first whistle of the "Thode Fagelund," and in so doing was negligent, and therein The Port of Portland was at fault; that the "Ocklahama" was negligently navigated in that no signal was given that her engines had been put full speed astern.*

(Record, p. 171.)

Both Pease and Turppa knew that the "*Thode Fagelund*" was heavily laden and going to sea.

Turppa saw her at anchorage the evening before, and navigated the "*Ocklahama*" between her anchorage and the beacon buoy on the trip down river. The Port of Portland admits this relevant fact in its answer. (See "*The Pleadings*" herein.) Pease says when he started with the tow the next morning it was his purpose to go around by the docks to give a wide berth to both "*Thode Fagelund*" and the dredge "*Chinook*" which he knew were anchored in the upper harbor of Astoria. He *expected* to meet them on his up trip, *that morning*.

The "*Thode Fagelund*" was heavily laden and riding deep draft in the water, and so was a sluggish and slow moving hulk when first departing her anchorage. *In fact*, had gone but some twelve hundred feet on her outward bound voyage when struck. The Court below in its findings (Record, p. 88) (November 16th, 1914) says:

"The pilot of the 'Fagelund' promptly blew two blasts of his whistle and put his helm hard-astarboard (where it remained until the collision) but receiving no answer, stopped his engines and a few seconds later, estimated to be ten or twelve, repeated the signals which were promptly answered by the 'Ocklahama,' but as the 'Ocklahama' did not appear to change her course the 'Fagelund,' within five or six seconds after the exchange of signals, ordered her engines full

speed astern, causing her bow to swing to starboard, blew four blasts of her whistle and, after the engines had been backing for about a-minute-and-a-half, dropped her port anchor, and almost immediately she was struck on the port bow a few feet from the stem by the bow of the "Thielbek," which plowed into her some distance almost on a line fore and aft."

THE PORT OF PORTLAND CASUALTY REPORT.

Date of Accident, August 24, 1913. Location, Astoria Harbor.

Nature of Casualty, Head-on Collision.

Name of steamboat, barge or dredge, "Ocklahoma" towing bark "Thielbek" and "Thode Fagelund."

On trip from Astoria.

DAMAGE TO PROPERTY OTHER THAN THE PORT OF PORTLAND.

Under this head report all accidents, resulting in any damage or loss to wharves, vessels or other property, other than Port of Portland. State exactly what was damaged, the amount, what action was taken after accident to prevent further loss, and what was done toward repairing damages.

S. S. "Thode Fagelund" had a large hole stove in her port side a few feet from her bow and extending from the deck of her forecastle-head to a little below her water line.

Brk. "Thielbek" had a couple of plates stove in on her starboard side and a number of others dented on both sides of her bow.

DAMAGE TO THE PORT OF PORTLAND PROPERTY.

Under this head report all accidents to Steamboat, Barge, Dredges, Wharves, Dry Dock, or other Board property. Estimate amount of damage; state how caused and what was done to prevent and repair the damages, and by whom assistance was rendered if any; force of wind; state of weather, and if at night, whether dark, moonlight or starlight.

All the Str. "Ocklahama's" lines carried away consisting of

One wire tow line,
One rope head line,
Two rope breast lines,
Three rope stern lines.

Witnesses:

Address:

Pilot A. L. Pease, Jr., on Watch.

H. E. CAMPION,
Supt.

I. TURPPA,
Captain.

FROM THE FOREGOING SHOWING IT APPEARS WITHOUT ANY WANT OF CERTAINTY WHATEVER, THAT THERE IS NO CONFLICT IN THE TESTIMONY OR DOUBT ABOUT THE FOLLOWING FACTS, ON WHICH WE SUBMIT THE COURT COULD MAKE DIRECT FINDINGS SUPPORTING THE ALLEGATIONS OF WILHELMSSEN'S LIBEL:

FIRST. Pease did not on first seeing the "Thode Fagelund" blow one whistle and hold to his course, and speed.

SECOND. Pease says himself his course was up by the docks around by Gilman Buoy to give vessels anchored there a wide berth.

THIRD. Pease did not promptly answer the "Thode's" whistle, and thereby misled Nolan concerning the definiteness and certainty of the "Ocklahoma's" subsequent intention and movements.

FOURTH. Pease waited one-half a minute, while going a ship's length and until he closed up his $\frac{1}{4}$ mile distance to one thousand feet before he acted; and even then kept on.

FIFTH. Pease, while tenaciously holding to protect himself as he testifies, never stopped his vessel.

SIXTH. Pease ran half speed ahead after signal exchange and before reversing during the interval when the view of the "Fagelund" was the

certainty of head-on collision within a minute's time.

SEVENTH. When within seven hundred feet Pease tenaciously held to the stern of the dredge notwithstanding he was backing full speed and could easily handle and turn his tow; and this, before "Thode's" green light shut in.

EIGHTH. The rent in the "Fagelund's" bow, and the turning of her stem to starboard establishes that the vessels came together so nearly head on that another foot would have put the "Thielbek" to the starboard or right side of the "Thode's" stem.

NINTH. The fact that the anchor shank or haft hanging at the starboard hawse pipe of the "Thielbek" was driven directly through her starboard bow establishes that the impact of the vessels was substantially in the line of their respective keels.

TENTH. Pease admits it was not impossible for him to have avoided collision.

ELEVENTH. Pease, however, swears THAT A MINUTE BEFORE THE COLLISION and that before the danger signals were given he thought there would be a collision.

TWELFTH. Pease swears "I WENT FARTHER THAN I SHOULD HAVE GONE" and "IN FACT, I WENT FARTHER THAN I WANTED TO GO," and also "I STARTED OF COURSE AND HAD

TO KEEP GOING LONGER THAN I EXPECTED TO HAVE TO GO."

THIRTEENTH. The failure to stop the swift-moving "Ocklahama" and "Thielbek" and the continuance of their speed without stopping to afford clear passageway to the "Thode Fagelund" after agreed signals, was the main unquestioned cause of this collision.

FOURTEENTH. Everything that should have been seen was clear and open to the view of Pease to be seen and acted on by him before any collision was *imminent*, that is, there was sufficient clear vision and distance for him at all times to act promptly, carefully and *efficiently*.

FIFTEENTH. Pease's conduct, direction and speed and in continuing and maintaining them after the "jaws of collision opened" and passage became narrow was another of the main unquestioned causes of this collision.

SIXTEENTH. The failure of Pease to follow Rules I to III at page 18 of the Pilot Rules, even after whistle of "Thode Fagelund" given and before Pease answered when he had seven hundred clear feet between her and the Astoria docks, and to refuse such course as the "Thode Fagelund" wanted, was another unquestioned cause of this collision, especially when Pease *entertained any doubt* either as to (a) position, (b) clearance, (c) course, or (d) intention of the

"Thode Fagelund" or *even if he believed* the signal as given by her was (1) unusual, (2) wrong if without reason, (3) and that there was no reason to give such signal.

SEVENTEENTH. It was open to Pease under the Pilot Rules and the laws of navigation to hold his course and speed *prior to the "Thode Fagelund's" first two whistles* and to have subsequently gained that same right by immediate compliance of four (4) blasts showing his real doubts of her intention and course (Rules, p. 18 Pilot Rules), but in failing to do either of these readily available things *which devolved upon him solely and alone*, at that stage of the circumstances, his failure caused the collision.

EIGHTEENTH. The law provides "*the misunderstanding or objection SHALL AT ONCE be made apparent by blowing the danger signal*" (Pilot Rules, p. 20, top of page, 2nd paragraph) and "BOTH STEAM VESSELS SHALL BE STOPPED, and backed if necessary, until signals for passing with safety are made and understood." (In, Pilot Rules No. VII, p. 20); BUT PEASE DID NOT STOP. The hawsers carried away. His report to the Port of Portland, and to the United States Inspectors, and his own evidence, conclusively show his headway still on at collision. The injury and impact demonstrate the force of the blow and the speed. (*The Bailey Gatzert*, 170 Fed. 103; 179 Fed. 47, top page 48);

and the violation of these requirements of the law by Pease was another unquestioned cause of the collision.

NINETEENTH. It is clearly the preponderance of uncontradicted and nonconflicting testimony that both the masters of the "Ocklahama" and the "Thielbek" were asleep and the conduct of the tug and tow was left by them solely and only to Pease.

TWENTY. That the actions of Pease do not constitute the performance of "*efficient*" pilotage and his failures and omissions are those of the Port of Portland.

These facts so determined in connection with the entry in the "Ocklahama" log and in the casualty reports describing the contact as an "*head-on-collision*" demonstrate to a moral certainty the accuracy of the conclusion that Pease went TOO FAR—FARTHER THAN HE OUGHT TO HAVE GONE—AND TOO FAST.

Verbal testimony, however creditable, is never allowed in admiralty cases to overcome demonstrated physical facts. The testimony, therefore, of Capt. Shaver, a member of the Port of Portland; of Turppa, the master, or of Pease, the pilot, that *full speed with* a tow in a crowded harbor on a clear night is a safe speed, does violence to the physical facts of the case. However much their combined judgment thus expressed may be valued, it can not be taken as establish-

ing proper and safe navigation against the pressure of hard physical facts and the admission of Pease himself that his powerful tug *could have* avoided not only the “*risk of collision*” but the actual collision itself.

The Bailey Gatzert, supra.

These considerations thus far are not founded upon *conflicting evidence* but upon direct and positive admissions, statements and explanations, made and given by witnesses who swore themselves to be in the best position to see and to know; and why the Court below apparently disregarded their application brings the cause here on the specifications of error already herein set forth. The pleadings were also apparently disregarded on the points here thus explained. For the same things were alleged and articulated by the libeling parties, and some of these things were actually reiterated in the answers of The Port of Portland as hereinbefore set out. It seems to appellant Wilhelmsen that the Court below as specified did not determine the cause as presented nor find, as it should have done, upon what was actually submitted to it. The whole decision, opinion and decree is put upon grounds which dismiss from consideration *the evidence set forth in this brief*. There is no conflict in this evidence; it is all one way.

THE CASE CONSIDERED FROM NOLAN'S VIEWPOINT.

There is only one previous citation of Nolan's testimony made in this brief and that is his answers on redirect examination to the subject matter introduced before him by Mr. Minor, (Record, Vol. 2, pp. 960 to 962), (See *ante*, herein just before "*Specifications of Errors*").

With respect to previous testimony, there is no conflict in Nolan's interpretation of his own position.

It is worthy of note, also, that Mr. Wood, the proctor for Knohr & Burchard, asked leave, and it was granted, to amend his libel upon another ground of negligence.

These portions of the record pertinent hereto are as follows:

MICHAEL NOLAN resumes the stand.

Cross-Examination continued—Questions by Mr. Wood:

Q. Captain, the testimony of Captain Hansen, which I referred to yesterday, and which Mr. Bristol objected to my stating unless I read it to you was this: Captain Hansen first tells about this conversation between you when he tells you "she may turn on you, Pilot," and you said "All right, sir. I know it, but it can't be helped." Then I asked whether any other conversation and he said, —I asked him, "And that is all the conversation you had about it?"

"A. That is all we had, and that is all we spoke to one another until we finished, and Nolan was a little worried and upset and I said, 'It is no use to worry.' And I also heard that somebody said there had been a row between us and the pilot, but you may state that is absolutely false. There is no such thing.

Q. Now, I want to know what conversation you had that he refers to that is where you appeared to be upset, and he said, "There is no use to worry about it."

A. I said yesterday that the conversation in that line was in regard to what had been done; that is, in this matter of the blowing of the whistles. They answered nothing. Telegraphed signals to the engine room. What was done. I
(Record, p. 893.)

think that, to the best of my knowledge, was all gone over, and if I appeared to Captain Hansen to be worried at that time, I want to state now the reason of it. I feel up from the time that I landed in this country, 22 years ago, up to that time, that my record on board a vessel, or anywhere ever I have been, has been excellent, and **I REGARDED THAT SITUATION OF THAT ACCIDENT AT THAT MOMENT AS BEING A STUMBLING BLOCK TO ME FOR THE REST OF MY LIFE**, and why wouldn't I at that time be upset and worried, after the collision had taken place? I put any man in responsibility on the

"Thode Fagelund," and ask if he wouldn't be worried. **I REALIZED THE DANGER THERE. I WAS SENT THERE BY THE PORT OF PORTLAND TO PILOT THAT SHIP OUT TO SEA. I WENT ABOARD THE "THODE FAGELUND," AND CAPTAIN HANSEN ACCEPTED MY SERVICES, AND EVERY ORDER I ASKED ABOARD THAT SHIP, AND EVERY COMMAND I GAVE WAS GIVEN FREELY AND WILLINGLY, AS TO THE BEST OF THEIR ABILITY, ABOARD THAT SHIP. THEREFORE, THE RESPONSIBILITY OF THAT ACCIDENT WAS NOT ON CAPTAIN HANSEN'S SHOULDERS OR MANAGEMENT.** And there is no reason why I wouldn't feel upset at that time.

Q. I didn't ask you whether you were upset or not. I asked you what was the conversation. Can you tell me?

A. I told you in the beginning just everything aboard of the vessels, signals to the engine room, answers given to the "Ocklahama," from the "Ocklahama," what was done, to the best of my knowledge. That is all.

(Record, p. 894.)

Q. Let me ask you this, Captain. You said I didn't get it straight. Captain Hansen, some time after you had reversed the engine, said, "If you continue backing, pilot, it will swing on you." That is what he said, about, isn't it? That is what he meant, I don't quote his exact words.

A. "You will cause the ship's head to swing to starboard."

Q. Yes, and then you said that you answered, "I can't help it; everything must be done to get her headway off, and to stop her swinging to starboard." Now, is that what you answered?

A. I will repeat the answer.

Q. Just tell me yes or no, if that is what you answered. Then you can go on and explain.

A. Your language and mine I don't think agree, because you ask me a question and want me to answer. Let me answer what actually was said.

Q. I don't want you to answer any other way than what was said.

A. All right. Captain Hansen said, "Pilot, if you continue to back this steamer, you will cause her head to swing to starboard." I said, "Yes, sir; I know that, but everything must be done that can be done to stop her headway, and stop her head from swinging to starboard." Now, that is about as near as I can, the actual words that passed. Now, Mr. Wood, in repeating this so many times, there may be something, some word or other, that I left out, or put another in, but that is about the average of it.

Q. I only care for the sense of it. Well, how were you going to stop her head swinging to starboard, under the reversed propellor?

A. The anchor being on the bottom, caused her head to stop. She would have to tear her

anchor through the bottom; therefore, her anchor being in contact with the bottom, would steady the ship's head.

Q. That is what I want. You relied on the anchor to stop the ship swinging to starboard.

(Record, pp. 866 and 867.)

Further cross-examination on behalf of Port of Portland—Questions by Mr. Minor:

Q. Captain Nolan, I show you a paper, and ask whether that is not the original report you made to The Port of Portland?

A. Yes, sir; that is my signature at the bottom.

Q. As I understand now, to go back to my question, at the time when you gave the first passing signal, in your judgment, you couldn't have passed safely port to port?

A. That is the question; that is the question that settles this point. Had the "Thielbek" blown one whistle, there was room to make a port passing, because she assumed to clear to port there. The "Thode Fagelund" was the ship that was burdened, and would have answered with one whistle, and would only have assumed the responsibility of colliding with the "Chinook." The other vessel had the distance between me and the Callender dock, which was the nearest point of contact, which was 600 feet to navigate in.

(Record, p. 948.)

Q. The answer is satisfactory to me, and I suppose the Court will understand. I do.

COURT: If he wishes to add an explanation, he may do it. I don't know that it is necessary.

Mr. MINOR: I don't either. I merely want to be fair with the witness before the Court.

A. The only thing I had reference to, Mr. Minor, and the only thing that I brought it up here for, was this: **THE PORT OF PORTLAND EMPLOYED ME, SENT ME ON BOARD THE "THODE FAGELUND," TO NAVIGATE THE SHIP, AS I SAID. THE CAPTAIN ACCEPTED ME; EVERY ORDER THAT I ASKED FOR WAS GIVEN WILLINGLY. I ACCEPTED THE RESPONSIBILITY OF THAT SHIP, AND I ALONE,** and after the accident it was my intention, if I had to sever my connection with The Port of Portland immediately, I was going to do so, but I was going to defend my actions on that particular time before this Court, and leave the matter clear before that.

(Record, p. 955.)

Mr. WOOD: In view of the Captain's testimony and that of Hansen, I want to amend my libel, in alleging the "Thode Fagelund" was negligent in lifting her anchor, when she could, by waiting a few minutes, have cleared the "Chinook."

Mr. BRISTOL: We will resist that upon that ground that it was an afterthought, and on the

ground they knew the position of the "Thode" in any event the night before.

Mr. WOOD: I intend to ask leave to amend in another particular, and will take it up after lunch.

Adjourned until 2 p. m.

Portland, Oregon, Friday, Sept. 11, 1914, 2 P. M.

Mr. WOOD: Your Honor, as I said before adjournment, I wish to amend my libel. Do you wish to hear that now? I suppose I ought to make a statement at the close of the testimony.

COURT: You have given notice of it. That is all that is necessary for the present.

(Record, pp. 972 and 973.)

THE DECRETAL ORDER OF JUNE 24TH, 1915, AGAINST "THODE FAGELUND" IN REM IS AGAINST THE FOREGOING EVIDENCE AND AGAINST THE LAW; *and amendments to pleadings were necessarily allowed.*

A case in admiralty is initiated by pleadings but tried upon the evidence and the entire record and the issues thus determined are brought within pleadings then deemed to be amended accordingly.

The Court should have taken the entire record in this case and decided the issues against and placed the liability upon The Port of Portland, rightfully as to both ships, save and except the *in rem* decree against Wilhelmsen's vessel, for as to her, the faulty navigation was that of the port.

The record in this case is made up by proceedings *in rem* and *in personam* and the liability found by the Court is a liability *in personam* only after consideration of the whole record. But it is plainly erroneous and against the law to charge the "*Thode Fagelund*" with all or any part of the damage suffered by the "*Thielbek*."

FIRST, because The Port of Portland is alone, under the decision of the Court, decreed liable and there is no independent negligence found upon the part of the "*Thode Fagelund*"; and the

port alleges that Nolan was in charge and directing the navigation of that ship.

(Record, pp. 62 and 63.)

SECOND, because the fault attributed to the "*Thode Fagelund*" is the fault of The Port of Portland and not her fault;

THIRD, because the Court does not find any, and the decision shows no fault or negligence on the part of the "*Thode Fagelund*" aside from the negligence of the pilot, Nolan, an employee of The Port of Portland;

(Record, pp. 62 and 63; *The Thielbek*, 218 Fed. 253.)

FOURTH, because it is the purpose of admiralty to reach the ultimate end of litigation promptly and effectively, and the decree required upon this record was one based upon all the evidence and issues presented.

FIFTH, because the owners of the "*Thielbek*" sued The Port of Portland and the "*Thode Fagelund*" jointly and the liability found by the Court is a liability *in personam* against the Port, but it decrees satisfaction *in rem* against the "*Thode Fagelund*."

SIXTH, because Knohr & Burchard have not proved any legal fault on the part of the "*Thode Fagelund*" separate and apart from The Port of

Portland as a fault contributing to the collision;
(*The Thielbek*, 218 Fed. 253.)

SEVENTH, the rule of *respondent superior* as to Wilhelmsen is not satisfied *because Nolan was not an employee of Wilhelmsen*.

It is well settled in the admiralty practice that where the cause is fully presented upon the merits and all the facts have been received in evidence without suggestion of surprise or express desire to put in further evidence, *the cause should be determined upon the merits of the whole case according as justice requires and that the pleadings should be deemed amended to conform to the facts proved*.

Lauderdale County v. Kittel, 229 Fed. 593.

The Maryland, 19 Fed. 557.

The Rhode Island, 17 Fed. 560.

The City of New Orleans, 33 Fed. 683.

In the courts of admiralty of the United States there are no technical rules of variance which will prevent the recovery by libellant who shows a meritorious case, but under the liberal and equitable practice amendments will be allowed even to a change of the libel.

DAVIS V. ADAMS (C. C. A. 9th C.) 102 Fed. 524.

In fact the court may award any relief under

a general prayer which the law on the whole record applicable to the case warrants.

Admiralty Rule 24.

It is the duty of the court to extract the real case from the whole record and decide accordingly.

The Syracuse, 12 Wall. 167, 20 L. Ed. 382.

In *Davis v. Adams* the Circuit Court of Appeals of the Ninth Circuit says, 102 Federal, page 525:

“The libel being *in personam* and the facts proven tending to establish a cause of action which might be prosecuted *in personam*, there does not appear to be any good reason why the libelant should not be permitted to amend his libel to conform to the facts of the case.”

In the Circuit Court of Appeals of the Second Circuit the rule is the same:

The Minnetonka, 146 Fed. 515.

In that case the court was held to have power to permit an amendment of the libel to conform to the proof so as to render a decree *in personam* against a claim for excess damage, citing *The Syracuse, supra*.

The Supreme Court of the United States has announced this doctrine several times, as follows:

Du Pont de Nemours v. Vance, 19 How. 162, 15 L. Ed. 584;

The Syracuse, 12 Wall. 167, *supra*.

The Gazelle, 128 U. S. 474, p. 487, 32 L. Ed. 500.

The general principle, therefore, is that if the record in the cause shows the subject matter of the controversy to be the question upon which the court awards relief and there is a general prayer for relief, the court may in every case upon the whole record consider what relief is to be awarded and pronounce it accordingly.

The Supreme Court of the United States went further than this in

Du Pont v. Vance, 19 How. 162, 15 L. Ed. 584,

And the Circuit Court of Appeals of the Second Circuit again in

Vogeman v. Raeburn, 180 Fed. 97.

deny an objection saying that it would amount to a miscarriage of justice to deprive libelant of his damages because the pleader had based his claim upon a mistaken theory *if the course of trial had been the same if the libel as amended had been originally filed*.

In the case of *The Livingstone*, 104 Fed. 918, it is held that where all the parties in interest were before the court and participated in all the controversies arising in the suit, *even the failure to file a libel will not preclude the party from recouping an amount justly due on the whole case* and the court will make a decree and pro-

nounce for him accordingly on the whole case even without a libel, 104 Federal, page 927, following *Davis v. Adams in our own Ninth Circuit.*

O'Keefe v. Staples Coal Co., 201 Fed. 131.

Libel by John S. O'Keefe and others against the Staples Coal Company seeking to recover damages for injury to their schooner caused by alleged negligence on the part of the respondent's tug in towing the schooner. *The negligence complained of is in bringing the schooner into collision with the county bridge.*

The respondent filed a petition which alleged that *the owners of the bridge are wholly responsible for the collision and ought to be sued for the resulting damages, the County of Bristol being impleaded.*

The court held that the county would be liable for the negligence of its employees in the operation of a draw bridge, *although they were in the performance of a public duty and under the law of the state exempt from liability*, the general maritime law which creates such liability being paramount and not controlled in an admiralty court by any rule of local law.

Again in the same case, 201 Federal 135, it was held that *the injury was due solely to negligence of the bridge tenders employed by the county*, for which negligence the county was liable, *passing a decree against the county solely*, the court saying:

"There must be an interlocutory decree for the libelants against the County of Bristol. As against the tug the libel must be dismissed. The circumstances of the case seem to require, however, that no final decree thus dismissing the libel should be entered until after the amount of damages recoverable from the county has been ascertained, so that the result reached as above can then be carried out by one final decree disposing of the entire case."

See also the same case, *O'Keefe v. Staples Coal Co.*, 201 Federal, 144, wherein it was held that the libelants were to have *a decree in their favor for the full amount of their damages against the county.*

This result, however, was denied appellant herein when he asked for it, in this case.

(See Record, pp. 230, 239 and 242.)

It is quite without the reasonable deductions which the court below attempted to make,

(The Thielbek, 218 Fed. 253.)

upon the evidence thus to be considered, to account for this collision simply because the Court assigns reasons *not entertained by the pilots themselves*, whom The Port of Portland maintains are experts in their trade. Moreover, the superintendent Campion and Master Turppa are arrayed against the deductions made by the Court below. So, proctors for all parties practically were forced by the Court's viewpoint to ask and obtain amend-

ments to comport with the theories the trial Court announced. It is quite plain however that much evidence was not considered, some disregarded entirely, and the pleadings of all parties necessarily therefore came within the rules above cited.

Moreover the Court itself had previously said: "*That The Port of Portland is liable for a maritime injury due to the fault of its tow boat or the negligence of its pilot is settled in this Court.*"

The Thielbek, 211 Fed. 686, following,

United States v. The Port of Portland (D. C.) 147 Fed. 865;

The Port of Portland v. United States, 176 Fed. 866, 100 C. C. A., 336.

This being the law, and the Court having found that The Port of Portland, through its pilot, brought about the injuries, why decree *in rem* for the "Thielbek"?

It is equally hard to get a satisfactory solution from the Court's opinion when analyzed in its four corners, (218 Fed. 252, 253), the Court distinctly finds and says that Pilot Nolan, an employee of The Port of Portland, *controlled the navigation of the "Thode Fagelund."*

The Court also found:

(a) 'But as the "Ocklahama" did not appear to change her course, etc."; and

(b) "The bow of the "Thielbek" plowed into

her some distance almost on a line fore and aft"; and that

(c) "It was thought wise to wait," etc., "in order to more accurately ascertain her position and intention"; and

(d) "That the range lights began to close up, whereupon the engines of the "Ocklahama" were stopped and put full speed astern under a port helm, in order to give the "Fagelund" time to make the passage before the "Ocklahama" would come up to the "Chinook"; and that

(e) "She was navigating in a narrow channel"; and that

(f) "The signals given were unusual and clearly excused the pilot of the "Ocklahama" from answering them until the "Fagelund" came out from behind the dredge"; and

(g) "If the "Ocklahama" had continued on the course she was pursuing at the time the signals were exchanged she would have passed at least 300 or 400 feet south of the place of collision."

And of the charges of negligence on the evidence in this brief pointed out, the Court said:

"But these are either not sustained by the testimony or did not contribute to the collision."

The Court further said:

"She was struck on her port bow almost head on, showing that if she had gone but a short distance to port, as she signalled she intended to do,

the "Ocklahama" and her tow would have passed in safety."

(The foregoing references are from pages 252, 253 and 254 of volume 218 Federal Reporter and have been set out here for the Court's convenience.)

It is to be noted that these things so specified from the Court's decision are neither consistent with the result of the opinion nor with each other, certainly not with the sworn testimony of Pease himself, and certainly not consistent with the result in condemning the "Thode Fagelund" alone.

Of these comments, shortly in their order:

If it be true that the "Ocklahama" did not appear to change her course and plowed into the "Thode Fagelund" almost head on (bottom of page 252 and also bottom of 254) it necessarily results that the vessels were not on crossing courses and the fifth position did not apply.

In order to aid this Court it has been pointed out that both Eggars and Oehring, as well as Pease himself, positively swear without contradiction that they saw the "Thode Fagelund" before she signalled, then why wait *"to more accurately ascertain her position and intention?"* If the purpose of stopping and backing the "Ocklahama" was to give the "Thode Fagelund" more time (middle of page 253) then Pease's sworn testimony, as well as the reports to his employer

and to the United States inspectors, that he was backing at full speed from three to four minutes from a point 700 to 1000 feet away, cannot be reconciled with this finding of the Court nor with the rest of the testimony nor the result, or else if it is believed, then we reach the indubitable conclusion that if the "Thode Fagelund" was navigating in a narrow channel so also was the "Ocklahama" and the speed was too great, as has been heretofore shown.

Upon the point of the Court's finding that the signals were unusual and excused Pease (near bottom of page 253) and that the "Ocklahama," if she had continued on her course, would have passed 400 feet south of the place of collision (top of page 254) it is sufficient to say, as previously shown by the casualty reports, by the log of the "Ocklahama," as well as by the evidence and the Court's findings, this was a "*head on collision*"; and it could not have been a "*head on collision*," under the circumstances found by the Court, to excuse Pease, if it be true that the "Ocklahama" would have run 400 feet south of the place of collision or that the signals were unusual with reference to a starboard passing when Pease himself swore as herein shown that they were right.

So we respectfully ask this Court on the part of this appellant to consider this evidence herein pointed out and determine this case equitably

and according to the weight and effect of the testimony herein set out.

THE PORT OF PORTLAND CANNOT AVAIL ITSELF OF LIMITED LIABILITY UNDER STATE STATUTES.

STATE LEGISLATION CANNOT ALTER OR ENLARGE THE PRINCIPLES OF MARITIME LAW.

WHEN MUNICIPAL CORPORATIONS UNDERTAKE THE MANAGEMENT OF SHIPPING FACILITIES FOR COMPENSATION, THEY BECOME AMENABLE TO THE GENERAL MARITIME LAW.

ESPECIALLY IS THIS SO WHERE THE SUBJECT MATTER, BY REASON OF THE SHIPPING INVOLVED, IS INTERNATIONAL IN CHARACTER.

The Port of Portland in this case undertakes, while availing of a limitation under an act passed by the people under the peculiar system we have in Oregon, to say at the same time that things done by it under that act are *ultra vires* its powers.

The Supreme Court of the United States long ago announced the rule of law that corporations are liable for every wrong they commit and in such cases the doctrine of *ultra vires* has no application and it makes no difference how foreign

the acts constituting the tort may be to the object of its creation or beyond its granted powers. Its offenses might even be such as will forfeit its existence.

Railroad Co. v. Quigley, 21 How. 209;

First National Bank v. Graham, 100 U. S., 699; 25 L. Ed. 750.

Chesapeake & Ohio R. Co. v. Howard, 178 U. S. 153, at p. 160.

The Court in this last case says:

"If the agents and servants of a corporation commit a wrong in the course of their employment and while in the performance of an agreement of the corporation which is *ultra vires*, the company is liable for the wrong thus committed, notwithstanding the illegality of the agreement."

Chesapeake v. Howard, 178 U. S. 160.

Will this Court nevertheless permit The Port of Portland to plead *full power and authority*, and then deny it and urge *ultra vires* doctrine?

Let us examine its own pleadings on this subject, and the attitude it represented and held out to the public.

The Port of Portland pleads in its several answers *its due and legal creation*, and that *it is authorized and empowered*, among other things:

For a further answer to the libel, this respondent respectfully shows unto your honors:

ARTICLE I.

This respondent is a municipal corporation, duly created, organized and existing under and by virtue of a certain act of the Legislative Assembly of the State of Oregon, entitled "An act to establish and incorporate 'The Port of Portland,' and to provide for the improvement of the Willamette and Columbia Rivers in said port and between said port and the sea," filed in the office of the Secretary of State February 18, 1891, and under and by virtue of sundry amendments of said act filed in the office of the Secretary of State respectively February 10, 1893, February 18, 1899, March 1, 1901, February 23, 1903, and February 26, 1903, and under and by virtue of an amendment to the said act of the Legislative Assembly proposed by initiative petition in 1908 *and duly adopted by the legal voters within the corporate limits of the Port of Portland* at an election held on the day of June, 1908, and under and by virtue of said act and the amendments thereof, and particularly under and by virtue of the said amendment of June, 1908, *The Port of Portland is authorized and empowered, among other things:*

* * * "to purchase, lease, control and operate steam tub-boats and steam and sail pilot boats upon such rivers and upon the Columbia bar pilotage grounds, *and to collect charges*

from vessels employing such tugs so operated and for pilotage services rendered by employes of said The Port of Portland, and said The Port of Portland shall have the right to claim and collect salvage for services rendered to vessels in distress in the same manner as a natural person. The charges for towage and pilotage shall be fixed by the Board of Commissioners of The Port of Portland and shall be public and published to the world. The charges for towage of sailing vessels shall include the services of such pilots as may be supplied by The Port of Portland. The charges for pilots supplied by The Port of Portland to steam vessels shall be fixed by its Board of Commissioners, but shall in no respect exceed the charges fixed by the State of Oregon for pilots upon the bar pilotage grounds and upon the river pilotage grounds upon the Columbia and Willamette Rivers."

(Record, p. 206.)

(Italics mine.)

The Supreme Court of the State of Oregon in *Farrell v. Port of Portland*, 52 Oregon 582, put *res adjudicata*, for the purposes to be considered here, the matters and things now attempted to be raised and asserted by the ingenious proctor, for the port in this case.

The Farrell suit was brought to enjoin the carrying into effect of the provisions of the initia-

tive amendment on the ground that the law was void because, first, the people of Portland had no power under the constitution to propose and adopt at the polls amendments to the act incorporating The Port of Portland, and, second, that if any such power existed it could not be exercised in pursuance of a general law at least until such general law had been enacted and that the law as adopted and in question was not in fact an amendment of the charter of The Port of Portland, but an attempt to confer powers not germane or logically connected therewith. In the course of the opinion Justice Bean very carefully announced the ground of his decision and said in the latter part of the opinion, 52 Oregon, page 590:

“Upon the same reasoning we think it can be legally authorized to operate and maintain tug and pilot boats as aids to and for the purpose of promoting the maritime, shipping and commercial interests of the port. It goes without saying that the establishment and maintenance of an efficient towage and pilotage service between Portland and the sea would promote greatly the shipping and commercial interests. The deepened river which The Port of Portland is authorized to maintain would be of but little value, unless towboats were provided to tow ships between the sea and the port, or unless an efficient pilot service is provided for entering and departing vessels.”

Thus announcing the definite policy under a flat interpretation of the law that it was for the benefit and not for the restriction of the rights of shipping.

Coming before Judge Bean, again in this case, he examined into the facts and the law and on November 24th, 1913, gave his decision on the point as follows:

*"In conducting a pilotage and towage business
 "it is not exercising powers and duties imposed
 "upon it as a mere agency of the state for public
 "general purposes, but is a mere substitute for
 "individual enterprises.. It undertakes to supply
 "to shipping the same accommodations that
 "would be supplied by a private corporation or
 "individual engaged in the same business. It
 "charges and receives compensation therefor, and
 "should, I take it, be held liable for the negligence
 "or incompetence of its employes, the same as
 "others engaged in the same occupation.. Nor
 "does the fact that it must employ pilots licensed
 "by the state affect its liability any more than it
 "would the liability of a private corporation en-
 "gaging such pilots."*

(Record, Vol. I, p. 493.)

There are no degrees of difference in the character, duties and the entity which goes to make up municipal corporations so classed *that they will include cities and exclude ports such as The Port of Portland*, and the Supreme Court of

the United States decides that where there is anything in the nature of a substitution of an individual enterprise out of which result compensation by way of fees and money constituting a fund devoted to the maintenance of the enterprise and the carrying on of the facilities concerned therein, that the exceptions ordinarily enforced by courts in favor of municipal corporations then will not exist under the maritime law.

The Supreme Court of the United States, after considering all of the common law questions and the decisions of a variety of courts with reference to the obligations and liabilities of municipal corporations, finally reached this conclusion:

“By the general admiralty law of this country often declared by this court a ship by whomsoever owned or navigated is liable for an actionable injury resulting from the negligence of her master or crew to another vessel, and that this rule of law was not subject to any modification because the property of a municipality could not be sued in rem and concluded that the prerequisite in admiralty to the right to resort to a libel in personam is the existence of a cause of accident maritime in its nature and that a collision upon the navigable waters of the United States creates a maritime tort and a cause of action within the jurisdiction of the courts of admiralty without question, and therefore that the rule of local law in the State of New York does not control the maritime law and afforded no ground

for sustaining the non-liability of the City of New York in the case at bar."

Workman v. New York, 179 U. S. 552; 45 L. Ed. 314.

This Court is aware that the following cases in this circuit determine the position of The Port of Portland in admiralty:

The John McCracken, 145 Fed. 705;

United States v. The Port of Portland, 174 Fed. 865;

United States v. The Port of Portland, 161 Fed. 193;

The Port of Portland v. United States, 176 Fed. 866;

Workman v. Mayor of New York, 179 U. S. 553, 45 L. Ed. 314, 332.

This being the relation of The Port of Portland under the general law, it is wise to note that in the printed tariff issued March 15, 1912, and which *Campion* says was in effect August, 1913, and not changed until April 30, 1914, (see record, pp. 1009 to 1024), *there is not a single word of reference of any kind whatsoever promulgated by The Port of Portland to the public, either domestic or international, in its relation with the port about any limitations of liability or of any condition of performance of the service to be rendered by it.*

As heretofore shown in this brief and as will hereinafter appear for the aid of the Court, the

brochure issued by The Port of Portland under the terms of the act which requires, as hereinafter shown, that the "*charges for towage and pilotage shall be public and published to the world,*" *there is not a single word of mention of any limitation of liability*, but on the contrary, although this brochure is issued January 1, 1912, there is not a single word about any limitation of liability or anything notifying the public affecting the towage and pilotage on the river conducted by it whereby any relation is created as is now being claimed.

(Record pp. 1071 to 1080.)

The Court is asked to remark closely that these brochures were distributed through Mr. Talbot, the general manager.

(Record p. 1080.)

The liability in these causes does not arise from the breach of a pilotage or towage contract, but from the fact that a collision—an exclusively maritime subject matter—happened upon the navigable waters of the United States and within the jurisdiction of this Honorable Court; and consideration of that subject matter in orderly conduct of procedure in accordance with admiralty and maritime jurisdiction has resulted in the bringing into court of the offending instrumentalities involved in this collision to answer for

their respective liabilities as the same may be found.

Foster v. Compagnie, 219 Fed. 351.

Under the maritime law a suit against a tug for damages by collision arises out of a wrong done by the tug and because of the maritime tort committed; and in admiralty there is a fixed rule for the division of damages applying to all participating boats or persons involved in the subject matter. The courts of the country have held that a tug is not subject to the obligations of a common carrier, but is only required to exercise ordinary care, caution and maritime skill, but for failure of any of these the tug boat is held fully responsible.

Southern Towing Co. v. Egan, 184 Fed. 275;

"The Adelia," 154 U. S. 593;

"The Blue Bell," 189 Fed. 824, 827;

"The E. V. McCaulley," 189 Fed. 829.

A suit, therefore, by the owner of a tow against her tug to recover for an injury to the tow by negligence on the part of the tug is a suit *ex delicto*; that is to say, the claim for damages is a claim in tort and not in contract. The claim in tort arises out of the duty imposed by law and is independent of any contract made or consideration paid or to be paid for the towage.

The earlier cases are:

The Brooklyn, 2 Ben. 547;

The Deer, 4 Ben. 352;

The Arturo, 6 Fed. 308;

The Liberty No. 4, 7 Fed. 230;

The Quickstep, 9 Wall. 665, 19 L. Ed. 767;

The Syracuse, 12 Wall. 167, 20 L. Ed. 382.

The later cases are:

The John G. Stevens, 170 U. S. 113, 124, 42 L. Ed. 969, 974;

See also 170 U. S. pp. 124, 125.

The J. P. Donaldson, 167 U. S. 599, 603, 42 L. Ed. 295;

The W. G. Mason, (C. C. A. 2nd C.) 142 Fed. 913 at middle of p. 918;

The Temple Emery, 122 Fed. 180.

In one of the early cases decided by the Supreme Court of the United States and cited in Wilhelmsen's main brief, *THE QUICKSTEP*, 9 Wallace, page 665, 19 L. Ed. 768, it is said:

"The libel was not filed to recover damages for the breach of a contract as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of which is the wrong suffered by

the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

The Supreme Court of the United States again in *The John G. Stevens*, 170 U. S. pages 124 and 125, (this case was cited in the main brief), held that a claim arising against a tug for damages arising from collision with a third vessel because of negligent towage *is a claim in tort*.

Sovereignty extends no farther than to a vessel territorially within its dominion. Rights asserted on state statutes can then only be enforced in admiralty against resident owners of domestic shipping owned or navigated in the state where the proceedings are instituted, or against the fund arising from surrender, where maritime subject matter not connected with injuries resulting in death gives jurisdiction.

La Bourgoyne, 210 U. S. 136;

Crapo v. Allen, 1 Sprague, 184;

Rundell v. La Compagnie Tranatlantique,
94 Fed. 366.

International Navigation Co. v. Lindstrom,
132 Fed. 475;

La Bourgoyne, 139 Fed. 433, 439;

Same case, 210 U. S. 138.

The holdings in these cases are:

"The territorial sovereignty of a state extends to a vessel of that state when it is upon the high

seas, the vessel being deemed a part of the territory to which it belongs, and it follows that the state statute which creates liability so authorizes recovery for the consequences of a tortious act and operates as efficiently upon the vessel of the state when the vessel is beyond the boundaries as it does when the vessel is physically within the state."

In the LINDSTROM case, prior to the Circuit Court of Appeals' decision in the 132 Federal above cited, District Judge Thomas took occasion, in the course of his opinion, to point out the distinction for which endeavor is made in this brief, and I give it in full:

"But it is urged that this holding contravenes the decision of THE ALASKA and kindred cases. There is no analogy whatever. When the state in special or general term legislates concerning a ship, and what exists or happens on board of her, it has to do with its own domain and subjects, and nothing else. When it gives a cause of action for damages resulting from negligent acts or omissions, in the first instance, to the offended person, or, if he die from the offense, to his representative, it legislates for the government of those who are standing on the soil of New York, and doing or omitting acts as inhabitants of the state. The state exercises no dominion over the sea, nor over those disconnected with its political rule. It defines the supreme law, subject to federal jurisdiction, for an in-

tegral part of its territory and the inhabitants thereof. In THE ALASKA, the facts were that an English ship herself independent of all but English authority, and sailing on the high seas, a place uncontrollable by the state of New York, ran into The Columbia, a vessel from New York, and drowned the latter's crew. The English ship, herself beyond the sway of the state of New York, navigated by those who owned no allegiance nor duty to such state, was sailing upon a sea, itself without the supremacy of that state, and did a wrongful act, not on the American ship, hence not upon or within the territory or jurisdiction of New York, but on the ocean, common ground for all nations, but under the municipal sovereignty of none. **THE STATE OF NEW YORK MAY PRESCRIBE HOW ITS OWN SHIPS SHALL BE CONDUCTED, THE PENALTIES FOR MISCONDUCT THEREON; BUT IT MAY NOT DEFINE HOW OTHER VESSELS SHALL BEAR THEMSELVES WITH REFERENCE TO ITS OWN SHIPS WHEN ON THE HIGH SEAS, NOR CREATE CAUSES OF ACTION FOR INJURIES OR DEATHS PRODUCED BY SUCH FOREIGN SHIPS.** In one case the statute of the state has an extraterritorial effect, in the other it has no effect, as the offender is foreign to its power, and commits his wrong at a place over which the state has no jurisdiction."

It is thus observed that, with subject matter cognizable in admiralty for basis of suit, the

farthest limit which state statutes can go, in the exercise of the sovereignty of the state as applied to the shipping under the control of the state, is to form a basis of claim for participation in the fund upon surrender; and that by the express holding of the Supreme Court of the United States the state statute can have no effect whatever unless the facts bring the subject matter, that is the ownership of the vessel or residence of her owners and the maritime subject of the controversy, within scope of maritime law.

The Alaska, 130 U. S. 201; 9 Sup. Rep. 461;
32 Lawyers' Ed. 923;

The Albert Dumois, 177 U. S. 240;

The Hamilton, 207 U. S. 398;

La Bourgoyne, 210 U. S. 138;

The following late cases demonstrate this view of the maritime law:

La Bourgoyne, 210 U. S. 138;

The Rockaway, 125 Fed. 692,

holds that state statutes of this character must be construed as applicable only to vessels used wholly in domestic waters.

The Circuit Court of Appeals, of the same circuit in which the case of *The Rockaway* arose, affirms this holding in

The Vigilant, 157 Fed. 747.

The very interesting remarks of this court

adopt the language of Judge Putnam in the case of

The Iris, 100 Fed. 104, 112.

The jurisdiction of the District Courts of the United States in collision cases is exclusive.

The Moses Taylor, 4 Wall. 411;

The Hine, 4 Wall. 555;

The Belfast, 7 Wall. 624.

Furthermore, the jurisdiction of the courts of the United States is independent of state legislation and that jurisdiction cannot be impaired or diminished by the statutes of the several states in any way whatsoever.

Barron v. Burnside, 121 U. S. 186, 30 L. Ed. 915;

McConihay v. Wright, 121 U. S. 201, 30 L. Ed. 587;

THE MOSES TAYLOR, 4 Wall. 429;

CHICAGO V. WHITTEN, 13 Wall. 286, 20 L. Ed. 577.

State navigation laws can not regulate the federal courts;

The Steamboat New York v. Rae, 18 How. 223; 15 L. Ed. 359.

Even contracts enforceable *in admiralty* are not be dealt with in conformity to state rules.

Watts v. Camors, 115, U. S. 353; 29 L. Ed. 407.

Liverpool & G. W. S. S. Co. v. Phenix, 129 U. S. 397, and 410 and following pages.

The Circuit Court of Appeals of this Circuit in the case of

THE DAUNTLESS, 129 Fed. 715-719, considered two separate cases: The first case was No. 952 and was a proceeding *in rem* brought by the administrator of John T. Doane, deceased, against the steamer Dauntless for damages occasioned by the death of Doane.

The second case was No. 953, and was a proceeding *in personam*, likewise brought by an administrator against Union Transportation Co., the owner of The Dauntless, for damages occasioned by the death of Kent.

These cases were disposed of by the Circuit Court of Appeals of the Ninth Circuit as follows:

The case *in rem*, No. 952, was dismissed.

The case *in personam* was sustained and damages decreed.

In reaching these conclusions the court followed *The Albert Dumois* and *The Onoko*, above cited, and after quoting copiously from these cases, speaking through Justice Hawley, said:

"We are of opinion that no substantial difference can be drawn between the statutes of the different states upon which *The Albert Dumois* and *The Onoko* were based, and the statutes under consideration. If any distinction exists, it must be conceded that the language of section 813 of the Code of Civil Procedure of California is stronger in favor of appellants' contention than the others; and,

"in the light of these opinions, and in view of the language used in the California statute, we feel compelled to hold that in the Doane case this court has no jurisdiction. That case is reversed, and the cause remanded, with instructions to dismiss the action."

The Dauntless, 129 Fed. 719.

A very apt illustration as applied to this case arises from the Circuit Court of Appeals of the Sixth Circuit, February 8, 1910, *Mack Steamship Co. v. Thompson*, 176 Fed. 499, wherein that court, considering a state statute on the subject of a lien right claimed by it to be given, said at page 503:

"If the local statute be construed to be without restriction as to the credit intended, it would give to a creditor at the home port of the owner an advantage superior to that of one who furnishes supplies or other assistance at a foreign port, a result THE VERY OPPOSITE TO THE GENERAL POLICY OF THE MARITIME LAW. A local statute which should give a lien absolutely and without regard to this rule, which rests upon a fundamental principle of the maritime law and is born of the necessities of commerce, WOULD BE IN EFFECT TO MAKE A NEW LAW FOR THE ADMIRALTY. If this can be done in respect to one thing, it may be done in many, AND IN THE END THE ADMIRALTY JURISPRUDENCE MIGHT BE HONEYCOMBED, IF NOT

DISPLACED, BY A MASS OF HETEROGENEOUS LOCAL STATUTES. Local statutes provide different rules in respect to the rank of liens, a matter of serious importance. A COURT OF ADMIRALTY WOULD ABANDON ITS OWN JURISDICTION, IF IT SHOULD ENFORCE THEM WHEN THEY WERE IN CONFLICT WITH THE RULES OF MARITIME LAW. And, if this be so, it must be because of the predominant authority of the admiralty court throughout the domain of the maritime law, which will not hearken to the ordinances of state legislation."

Further application of these doctrines is found in the case of *THE FRED E. SANDER*, decided October 20, 1913, in the District Court for the Western District of Washington, Northern Division, in 208 Federal, page 725.

The whole case is pertinent to the considerations which we have at bar and particularly the reference to the *Workman* case made upon page 729; and epitomized, the holding is:

"A STATE IS WITHOUT POWER TO ABOLISH OR LIMIT THE JURISDICTION OF COURTS OF ADMIRALTY OVER MARITIME TORTS CONFERRED BY THE CONSTITUTION."

The rule for division of damages is an ancient and honorable rule in the admiralty long previous to the admission of Oregon as a state into the union and necessarily when Oregon came

into the union it came in subject to the laws of the United States and of the general maritime law of the country as administered by its courts.

The Max Morris, 137 U. S. p. 1.

Beldon v. Chase, 150 U. S. 691.

The Victory, 68 Fed. 400.

Greenwood v. Westport, 60 Fed. 578;

The Mystic, 44 Fed. 399.

The Oregon, 45 Fed. 74.

The Serapis, 49 Fed. 397.

It results that this court would not be free to exercise untrammelled its full and exclusive jurisdiction under the general maritime law if the state statute of Oregon in the particulars pleaded and argued by The Port of Portland were enforced.

That is to say, the admiralty system of laws is within the exclusive control of congress and the states have no power to regulate or to legislate in regard to it, or, as said by the Supreme Court of the United States, "A statute of a state cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases."

In *BUTLER V. BOSTON & SAVANNAH STEAMSHIP CO.*, 130 U. S. p. 527, syl. 5; 32 L. Ed. p. 1024, the Supreme Court says, referring to the statute of Massachusetts:

"Whatever force it may have in creating

liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea. Not only is that law the common right of the people of the United States, but the national legislature has regulated the subject, in greater or less degree, by the passage of the navigation laws, the steamboat inspection laws, the limited liability act and other laws."

Within these principles the conclusion must necessarily follow that no legal limitation of liability going to the very elements of a decree pronounceable by a court of admiralty in a maritime matter can be valid either as a limitation of the jurisdiction of the admiralty courts of the United States or as a limitation upon any matter involved before them.

Now in this case the main subjects of the distressful want of care and negligence upon the part of The Port of Portland and its instrumentalities are two foreign vessels: The "Thielbek," a German ship; and with the Empire of Germany the United States has a treaty; and the "Thode Fagelund," a Norwegian ship; and with the Kingdom of Norway the United States has a treaty.

Both of these treaties were in force prior to 1908.

The acts of congress have furthermore provided that any discrimination against vessels navigating the high seas by any law of a state will not be permitted.

Section 4237 Revised Statutes of United States.

The constitution and laws of the United States and the treaties made and to be made under their authority are the supreme law of the land and no state can change the effect or purpose of the constitution, those laws or those treaties.

These treaties then and now in force with others made or to be made, and the constitution and laws of the United States are the supreme law of the land, *Hapburn v. Griswold*, 8 Wall. 603; 19 L. Ed. 513; and a state law is void if inconsistent with a treaty, for there can be no law inconsistent with fundamental law.

Sinnott v. Davenport, 22 How. 227; 16 L. Ed. 243.

House v. Mayes, 219 U. S. 282; 55 L. Ed. 213.

These ships belonging to the Empire of Germany and the Kingdom of Norway respectively are not amenable to the laws of Oregon so as to be cut off from the benefit of the general maritime law.

Fisher v. Boutelle, 162 Fed. 994.

The Hamilton, 207 U. S. 398.

La Bourgoyne, 210 U. S. 138.

Why then argue that these two foreign ships coming from the *Seven Seas* are held to know some silent and insidious limitation now first asserted by the Port of Portland, and not even published in its brochure in which it says:

Mr. BRISTOL: I offer this in evidence.

Marked "Libelant Wilhelmsen's Exhibit 13 (Campion)."

(Foreword and Shipping Directions from Wilhelmsen's Exhibit 13.)

FOREWORD.

The Port of Portland Commission in presenting this brochure to the ship owning public, has endeavored to give only facts obtained from the most reliable sources, TOGETHER WITH EXACT DATA RELATING TO THIS PORT'S CONDITIONS AND CHARGES.

Any more information required regarding shipping matters or commercial conditions of this section will be cheerfully supplied upon application, either to The Port of Portland Commission, City Hall, Portland, Oregon, or the Portland Chamber of Commerce, Fifth and Oak Streets, Portland, Oregon.

THE PORT OF PORTLAND.

Portland, Oregon, U. S. A., Jan. 1, 1912.

In the case of *Mersey Docks & Harbor Board v. Gibbs*, L. R. 1, H. L. 93 at H. L. pages 105-107, at page 122, Lord Cranworth remarked:

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damages by the negligence of those who have the management of the facilities, they will be entitled to compensation and in others they will not; such distinction arising not from any visible difference in the facilities themselves, but in some municipal difference in the constitution of the bodies by whom the facilities are managed."

The courts generally have enforced liabilities of such character against municipalities *in personam*.

Thompson Navigation Co. v. City of Chicago, 79 Fed. 984.

Henderson v. City of Cleveland, 93 Fed. 844.

O'Keefe v. Staples Coal Co., 201 Fed. 131.

Greenwood v. Westport, 60 Fed. 560 and 579.

City of Boston v. Crowley, 38 Fed. 202.

The Port of Portland has no right or power of limitation of liability, *first*, because congress has legislated on the matter of limitation of liability to be obtained in a special proceeding pre-

scribed by law; *second*, the states have neither the right nor the power to legislate in respect of admiralty matters which in any wise affect the exclusive jurisdiction of the admiralty courts of the United States; *third*, the practice of the admiralty courts of the United States has, long prior to the passage of any law of the State of Oregon, and, indeed, *prior to the admission of it as a state into the union*, maintained a rule of division of damages for participating faults by joint maritime tort feasons for a tort committed upon the high seas or navigable waters of the United States and it is without the power of any municipality to set that rule or practice aside; and, *fourth*, that The Port of Portland is engaged in the same manner as private persons or corporations in an individual enterprise of conducting the business of towage and pilotage for hire and therefore must perforce of the circumstances take unto itself all of the liabilities and responsibility that would come to private persons in a similar situation without claiming the benefit of any quasi public nature or any atomic sovereignty derived from the state; *fifth*, congress itself has provided a means for limitation of liability in collision causes when the owner is *without privity or knowledge* of acts or facts from which it could be concluded that he was guilty of some want of care; *sixth*, there is no limitation of liability for collision on the high seas in American law, except such as is based upon the

acts of congress; *seventh*, furthermore, it must not be overlooked that tugs employed in the business of towing into and out of harbors and between ports vessels engaged in interstate commerce are themselves instrumentalities of that interstate commerce and that consequently it would follow that any limitation constituting for any such tugs or any such towing business a privilege or immunity not available to all persons similarly engaged would be not only inimical to the provisions of the constitution, but likewise inimical to the provision of the Sherman Anti-Trust Law.

United States v. Great Lakes Towing Co.,
208 Fed. 733.

Hence, the jurisdiction here of the District Court of the United States was and is solely because of a maritime subject matter occasioned and occurring within its jurisdiction, to-wit, a collision upon the navigable waters of the United States.

The Admiralty rules provide:

"IN ALL SUITS FOR DAMAGE BY COLLISION, THE LIBELANT MAY PROCEED AGAINST THE SHIP AND MASTER, OR AGAINST THE SHIP ALONE OR AGAINST THE MASTER, OR THE OWNER, ALONE, IN PERSONAM."

The maritime law is not of one interpretation in one community and of another and entirely

different interpretation elsewhere, for if that were the case the persons, and the property of those persons, "who go down to the sea in ships," could never be administered with financial success or certainty of operation. The whole body of the maritime law never permitted, nor was there known to it, a conditional limitation or any limitation whatever based upon partial performance of duties reciprocally to be rendered by the persons involved in observing its mandate. According to the maritime law a proceeding against a tug is a proceeding *ex delicto*, arises out of the very body of the wrong and gives a right in the thing, the offending thing, engaged in navigation for satisfaction of the damages committed by it. This maritime law subsisting as an entirety is the subject of peculiar federal jurisprudence and administered by the federal courts without impairment by state legislation. If changes are to be made in the maritime law these changes can only be made by federal authority. Inasmuch as the jurisdiction attaches solely because of the maritime nature of the subject matter, it is both logical and reasonable to say that the rights to be claimed are to be of the same quality as the subject matter.

THE DETERMINATION OF THE COURT UPON THE SUBJECT OF COSTS WAS INEQUITABLE AND OBVIOUSLY AN ABUSE OF DISCRETION, OVER THE OBJECTIONS OF WILHELMSSEN.

Wilhelmsen filed his cost bill (Record, page 137) and among other items included those which came within the aspect of the case as it was presented up to the time of trial, and among other items the sum of \$477 paid Mary E. Bell, the court stenographer, for the record upon which all of the proceedings up to that time had been had and subsequent proceedings and the appeal prosecuted.

(Record, pp. 138 and 139.)

The items allowed by the Court are shown in the right hand column and the items which were disbursed by Wilhelmsen and which were disallowed by the Court on the objections of The Port of Portland (Record, p. 140) are shown in the left hand column.

The disallowance and objections were footed upon the order of December 14, 1914, (Record, p. 107) as shown by the order entered February 7, 1916, (Record, pp. 145, 146).

In connection with these proceedings Wilhelmsen assigned error (Record, pp. 282 to 284), the Court at the same time having passed to Knohr & Burchard costs and disbursements in the sum of \$2247.93, January 3, 1916, (Record,

p. 137), but it had previously taxed costs, the 24th of June, 1915, by the decree appealed from by Wilhelmsen herein, in the sum of \$239.49 (Record, p. 247).

It will be observed by reference to Record pages 138 and 139 that the items in the left hand column which are disallowed related to the surety bond given by Wilhelmsen to release his ship, and also to the payments for the taking and transcription of testimony designed to meet the defenses that had been raised by The Port of Portland with reference to defective steering gear and propeller, which defenses The Port of Portland afterwards abandoned.

If it was proper to allow the costs to the "Thielbek" January 3, 1916, as shown, then there should have been a decree in favor of Wilhelmsen against The Port of Portland for those costs.

If it was proper to disallow Wilhelmsen's costs against The Port of Portland by virtue of the order of December 14, 1914, on the condition of an amendment, then it certainly, on the same principle, was an abuse of discretion to refuse those costs to Wilhelmsen when he was put to expense to meet the contentions of The Port of Portland which it abandoned and in respect of which it also was allowed to amend its answer.

Surrounding this action of the Court Wilhelmsen's objections are set out on pages 248 to 253 of the record and also on pages 243 and 245 of the record, both before and after the allowance

of the decree herein appealed from by Wilhelmsen.

The Court's action was on July 19, 1915, on these objections (see Record, p. 261), and Wilhelmsen again called the attention of the Court to this matter on the 7th of February, 1916, and the action of the Court at that time brought about as hereinbefore explained the additional assignments of errors (Record, p. 281) all relating to the way and manner the allowance of costs were made, as if the causes were then consolidated under the order of October 25, 1915, given on the ex parte application of the proctor for The Port of Portland (Record, p. 129).

Now it will be observed that The Port of Portland on the 9th of November, 1915, as shown on record p. 129, *had already served its notice of appeal in the Wilhelmsen case*. But notwithstanding that it had appealed on the 9th of November, 1915, *The Port of Portland entered into this matter of the settlement of costs on the 7th day of February, 1916*, (Record, p. 145), *having previously filed its objections on the 21st day of January, 1916, and took part in the proceedings which culminated in the rendition of the final decree for Knohr & Burchard* and the allowance to Knohr & Burchard of the costs and disbursements taxed at \$2247.93 which the Court refused to allow to Wilhelmsen against The Port of Portland.

It is respectfully submitted that in view of this situation in the record, Wilhelmsen should not have been mulcted in these costs, at least without the right of recovery against The Port of Portland. It was manifestly inequitable and unfair to deny Wilhelmsen the recovery of his expenditures to meet the abandoned defense of The Port of Portland. It was manifestly unfair and inequitable to deny to Wilhelmsen the recovery of the amount he paid the official stenographer, Mary E. Bell, for the record which was obtained by all the parties to this cause.

It is therefore submitted that the trial Court exceeded in a legal sense the bounds of reason all of the circumstances before it being considered, and when the entire case is before the Appellate Court it has control of the subject of costs as well as of the merits.

Dyer v. National Steam Navigation Co.,
(748) 118 U. S. 519, 520.

Trustees v. Greenough, 105 U. S. 527.

WHEREIN THE POSITION OF THE PORT OF PORTLAND IS FURTHER FALLACIOUS, REFERENCE BEING HAD TO ITS BRIEF.

The error in the argument of The Port of Portland lies in the assumption that the liability it is sued on in these cases rests upon statutory foundation.

It argues against the admitted fact that it uses and employs pilots and tugboats and says that such use and employment of pilots and tugboats is *ultra vires*.

It demands a limited liability but with equal inconsistency applies that limitation to both ships injured by it. (See page 98.)

It seems sufficient answer on the face of things to repeat that *the Port was sued in these cases for a collision liability without any relation whatsoever to the State statutes*, that the liability of the Port presented to the Court was its liability under the general maritime law without any reference to any state statute.

The Port is attempting to introduce a state statute as a defense and limitation of its general maritime liability.

In order to put up this argument to distinguish the *Workman case* it very adroitly assumes and admits the correctness of the Court's findings as to Pease and the navigation of the "Ocklahoma," but denies that it was answerable for the negligence of its pilot Nolan. (See Argument, page 39.) "*Of the findings of fact The Port of Portland does not complain. Due consideration was given to all the evidence and the findings are fully supported by the evidence,*" but says on page 18, "The Port of Portland not answerable for negligence of its pilot Nolan." It attempts to present, in the middle of page 27 of its brief, the very question made *res adjudicata* in the case

of *Farrell v. Port of Portland*, *supra*, to which attention of this Court has already been called in this brief.

With this fallacious position as its foundation for argument, the Port continues then to make the surprising declaration that the Court ought not to have allowed any amendments to the libels notwithstanding it allowed The Port of Portland to amend its libel.

Against the positive testimony of its own pilot Nolan set forth in this brief that he was alone responsible for the navigation of the "Thode Fagelund" and notwithstanding its own allegations in its several answers that Nolan controlled that navigation, it now with equal inconsistency embraces the doctrine of *ultra vires* and asserts that the navigation of the tugboat or of any of the vessels involved was not its navigation.

It may be said with equal truth that if the opinion of the Court does not point out in what particular Nolan's act of negligence contributed to the collision that it is not pointed out in the opinion on the other hand how it was that the acts of Pease did not contribute to the collision. (See page 48.)

It is not proposed to take further time to reargue the matters already presented for consideration of the Court in pursuing the amazing attitude that the proctor for the Port sets out in his brief.

It remains, however, to point out that on page

83 the glaring fallacy pursued by the eminent proctor is stated in his own language thus:

“Workman v. New York clearly has no bearing upon a case in which, as in the one at bar, no right of action or suit could exist except by operation of the local statute.” (Italics mine.)

The whole brief of The Port of Portland is constructed upon such a theory. It pleads that it was *“duly authorized and empowered,”* as hereinbefore set forth. It pleads *that its own pilot controlled this navigation* and the Court so found and The Port of Portland admits it. It asserts “clearly, therefore, this suit, though in form sounding in tort, is based upon a contract—the terms of the statutes creating both The Port’s duties and its liabilities—without which no tort would be possible.” (See page 68.)

Without further attention to these matters it must be quite clear that against the plain and established rules of law, here in this brief heretofore cited, these borrowed theories of The Port of Portland ought not to prevail.

True it was sued *in personam* for the reason that in the District of Oregon the Federal Court held that even the United States could not sequester the dredge “Columbia” for putting its light-house tender to the bottom of the Columbia River in the vicinity of Westport light. But the sovereignty thus acknowledged is not acknowledged to the length that it may modify the whole mari-

time law, change the jurisdiction of the Courts of the United States, interfere with international shipping and create a port with special privileges and immunities more favored than others receive by the application of the general maritime law. By a long and unbroken line of adjudication municipalities have consistently been held liable for their acts notwithstanding their claim of sovereignty upon the application of the general rules of law.

With much stronger reason therefore does the present case appear for by an unbroken line of adjudication of years, states have never been allowed to usurp the right of congress upon national subjects or to independently legislate upon subjects already legislated by congress. More especially, admiralty and maritime affairs of general and international character and relation.

As previously pointed out, the congressional ship owners' liability act is available to The Port of Portland in any case where it can be shown without its privity or knowledge injuries complained of occurred, *and it is not competent for the State of Oregon to set up an independent liability act*, when congress has spoken.

Moreover the federal jurisdiction is exclusive and new methods or new procedure will not be permitted either to confine or enlarge the exclusive jurisdiction established by congress. According to The Port of Portland Your Honors are

forced, if the argument of its proctor is good, to go directly against a long and current line of decisions of the Supreme Court of the United States on the subject of the exclusiveness of admiralty and maritime jurisdiction and are forced, moreover, to overrule a number of decisions rendered in this circuit which stamp with disapproval any attempt to enlarge or confine the exclusive admiralty and maritime jurisdiction of the United States.

"Saving to suitors in all cases a common law remedy where the common law is competent to give it," is written in the statutes of the United States, but no one of the parties to this record was pursuing a "common law remedy," but each suitor was pursuing his remedy in a "cause of collision" under the general maritime law.

The general maritime law does not recognize the right of any sovereignty to set up for itself a limitation within the general body of that law. In fact some of the famous controversies that are now making history for the United States relate to this very international question of *established rule upon the high seas* and the observance of these established rules is demanded of another great nation simply because all the nations of the earth have concurred therein *so far as shipping is concerned* over the Seven Seas.

It is quite astonishing, therefore, that the State of Oregon can be even accredited with the attempt, let alone the authority, *to enact for*

itself, through any of its municipal instrumentalities, a new rule to be grafted upon the general maritime law.

Beyond this Your Honors will note that with reference to domestic shipping the states are allowed to legislate very much as they please with respect to those subjects where the acts of congress have not already provided exclusive regulation, a right or a remedy; but no Court has ever decided that a State statute, however applicable it might be to its domestic ships, can override the acts of congress and the general maritime law of the country and confer special privileges or establish restrictions not recognized by the constitution of the United States, the laws and treaties made and to be made under their authority.

It is manifestly *unfair* and *inequitable* to mulct foreign ship owners, whose ships we invite to carry our commerce, by allowing any municipality, by the claim of sovereignty against the authority of the national government and its Courts, to assert a limited liability *that it does not even publish as required by its own law to the public with whom it deals.* (See "*Tariffs*" and "*brochure*" in Evidence.)

In the words of the *Farrell* case, "*It goes without saying that the establishment and maintenance of an efficient towage and pilotage service between Portland and the sea would promote greatly the shipping and commercial interests.*"

The deepened river which The Port of Portland is authorized to maintain would be of but little value, unless towboats were provided to tow ships between the sea and the port, or unless an efficient pilot service is provided for entering and departing vessels."

In the interest, therefore, of full justice and equity, in the interest of the untrammelled administration of maritime justice this appellant appeals to Your Honors for a decision which will establish the full measure of the relief that the evidence and the pleadings seem plainly to entitle him upon this record.

Respectfully submitted,

May 4, 1916.

WILLIAM C. BRISTOL,

Proctor for Wilhelm Wilhelmsen
of Tunsberg, Norway, Respondent
and Appellant.

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE PORT OF PORTLAND, a municipal corporation
RESPONDENT AND APPELLANT

vs.

WILHELM WILHELMSSEN
LIBELANT AND APPELLEE
and **KNOHR & BURCHARD, Nfl.**
CLAIMANT OF THE THIELBEK AND APPELLEE

THE PORT OF PORTLAND, a municipal corporation
RESPONDENT

and **WILHELM WILHELMSSEN**
CLAIMANT OF THE STEAMER THODE FAGELUND
APPELLANTS

vs.

KNOHR AND BURCHARD, Nfl.
LIBELANT AND APPELLEE

Brief for Appellee, Knohr and Burchard, Nfl.

WOOD, MONTAGUE & HUNT and
MR. ERSKINE WOOD
Yeon Building, Portland, Oregon
Proctors for Knohr and Burchard, Nfl.

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Proctors for the Port of Portland

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IN THE
United States Circuit Court of Appeals
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THE PORT OF PORTLAND,
a Municipal Corporation,
Respondent and Appellant,

vs.

WILHELM WILHELMSSEN,
Libelant and Appellee,
and KNOHR & BURCHARD, Nfl.,
Claimant of the Thielbek and Appellee.

THE PORT OF PORTLAND,
A Municipal Corporation,
Respondent,
and WILHELM WILHELMSSEN,
Claimant of the Steamer "Thode Fagelund,"
Appellants

vs.

KNOHR & BURCHARD, Nfl.,
Libelant and Appellee.

Brief for Appellee Knohr & Burchard, Nfl.

STATEMENT

The statement of facts in the brief of appellant, The Port of Portland, is substantially correct. This appellee, however, does not agree with the statement on page 6 of the brief that "The running lights of the 'Thielbek'

and 'Ocklahama' were in view of those on the 'Thode Fagelund' until immediately prior to the collision, when the red lights were shut out," etc. If this means that the green light of the "Thielbek" was in view from the first, then we contradict the statement, as it is our contention that it was at first shut out, and did not appear until later.

There are some other criticisms that we might make on the statement, but, if necessary, think that we can do so just as well in the argument. We desire to call attention to the fact that the "Thielbek" was lashed to the side of the "Ocklahama," and took no part whatever in the navigation of the two vessels. The "Thielbek" kept her helm amidships, in obedience to the orders from the "Ocklahama," and the entire control and command of both vessels was exercised by the "Ocklahama." The tug and tow were operated from the pilot house of the "Ocklahama." Thus, whatever side was liable—the "Thode Fagelund" or the "Ocklahama"—the "Thielbek" was not to blame.

Knohr & Burchard's libel is set forth on pages 152-174 of the *Apostles*, and sets forth their theory of the collision. The theory was that the Thode Fagelund or the Ocklahama or both were to blame, but that in any event the Thielbek could not be to blame, for she was a mere tow, not participating in the navigation, and that her owners could recover from the Thode Fagelund or the Port of Portland, or both. The trial court found the Thode Fagelund alone to blame and in that finding we acquiesce. Indeed, we contended for it at the trial, and contend for it now. But in doing so we do not relinquish

any of our rights against the Port of Portland, as owners of the Ocklahama, if it should appear to your Honors that the Ocklahama was to blame.

Finally, it should be noted that none of the parties to this appeal contend that the Thielbek was in any way to blame. Whatever allegations Wilhelmsen's libel made against her, as an individual ship distinct from her tow, have now been abandoned.

ARGUMENT

WILHELMSEN CANNOT QUESTION ON
THIS APPEAL THE DECREE IN CAUSE
NO. 6111 DISMISSING HIS LIBEL AS TO
THE THIELBEK AND AWARDING THE
THIELBEK HER COSTS.

These causes were, in the court below, consolidated for trial, but not for the purpose of rendering one decree. They were kept separate throughout, and only consolidated for the convenience of having the same testimony and arguments answer for both cases. The cases were in every other respect separate and distinct and separate decrees were therefore made in each case. The first case to reach a final decree was the one numbered 6116, in the lower court, and entitled Knohr & Burchard, Nfl, Libellant, vs. The Thode Fagelund, etc., Wilhelm Wilhelmsen, Claimant, and The Port of Portland, respondent in personam. This decree is on pages 246-248 of the Apostles, and decreed that Knohr & Burchard, Nfl. recover from the Thode Fagelund and the Port of Portland damages in the sum of \$12,805.26, with interest, and \$239.49 costs, and allowed the Thode Fagelund to recover over

from the Port of Portland any amount she might have to pay to Knohr & Burchard under this decree. This decree was entered June 24, 1915. From this decree both Wilhelm Wilhelmsen, owner of the Thode Fagelund, and the Port of Portland have appealed.

The other case was numbered in the court below 6111, and was entitled Wilhelm Wilhelmsen, Libellant, vs. The Bark Thielbek, Knohr & Burchard, Nfl. owners, and The Port of Portland, respondent in personam. In this case Judge Bean exonerated the Thielbek, but awarded Wilhelmsen his damages against the Port of Portland on account of the negligence of Pilot Nolan. At the time Knohr & Burchard's decree in cause 6116 was entered, Wilhelmsen had not yet proved his damages, so no decree was entered in the Wilhelmsen case. When Wilhelmsen proved his damages, his proctor prepared and the court made a decree which gave him those damages, and will be found on pages 125-127 of the Apostles. This decree was entered October 25, 1915. From it the Port of Portland has appealed. This decree gave to Wilhelmsen his damages, but did not dismiss Wilhelmsen's libel against the Thielbek, nor award the Thielbek her costs, which were considerable. This decree adjudicated *one* of the issues in the case—that between Wilhelmsen and the Port of Portland—but left unadjudicated another issue quite as important, namely, that between Wilhelmsen and the Thielbek. The decree was in effect interlocutory, since it did not make a final disposition of all the issues in the case, which is a requisite to a final decree. (Benedict's Admiralty, 4th Ed., Sec. 466 and Sec. 568.)

Parenthetically we may say that this decree was prepared by the proctor for Wilhelmsen, who was naturally mainly interested in getting his damages, and the omission to dismiss the libel as to the Thielbek and award her costs was undoubtedly an oversight, both on the part of the proctor and the judge. The decree was prepared and entered during an absence from Portland of the writer, proctor for the Thielbek. When he returned, Judge Bean was away. As soon as Judge Bean returned, the Thielbek's proctor called the omission to his attention and he then made a further decree which dismissed Wilhelmsen's libel against the Thielbek and awarded the Thielbek costs in the sum of \$2247.93. This decree was entered January 3, 1916, and is on pages 136-137 of the Apostles. *From this decree no appeal has been taken and it must stand intact.* It is the final decree between Wilhelmsen and the Thielbek in cause No. 6111, and until an appeal is taken from it and errors assigned, it cannot be questioned in this court. Your Honors must not mistake the assignments of error on pages 281-284 of the Apostles as referring to this decree. Those are additional assignments of error on Wilhelmsen's appeal from Knohr & Burchard's *decree of June 24, 1915, in the other cause No. 6116*, and are especially entitled in that cause and stated to be in support of Wilhelmsen's "petition and notice of appeal, and in the prosecution of his said appeal in the above entitled cause *from the decree of the 24th of June, 1915.*" We point this out because some reference is made in these assignments to the decree in case No. 6111. Just what the purpose of these references is we do not know. But it is obvious

that these assignments, expressly stated to be in pursuance of Wilhelmsen's appeal from the decree in the other case, cannot be treated as assignments of error in the decree in cause No. 6111. Indeed, it is superfluous to argue this point, for our position is clinched by the fact that no appeal of any kind has been taken from the final decree in cause No. 6111 dismissing Wilhelmsen's libel against the Thielbek and awarding the Thielbek costs. Obviously, then, that decree cannot be here called in question.

In passing we may say that the 37th of Wilhelmsen's additional assignments of error is to us without meaning. It says "That the court erred in giving a judgment, order or decree in favor of Knohr & Burchard for any amount in costs after said court had originally entered a decree in favor of the Thielbek and its owners and claimants, Knohr & Burchard, in cause 6111, from which this appellant had theretofore appealed."

Now, the court had never before entered *any* order or judgment in favor of Knohr & Burchard *in cause No. 6111*, and consequently no body could ever have appealed from it. And "appellant" Wilhelmsen has never appealed from *any* decree in that cause.

It is true that before Judge Bean made the final decree in cause 6111 dismissing the libel as to the Thielbek, and awarding her costs, The Port of Portland had appealed from the earlier decree in the same cause, which gave damages against it. We contend that this earlier decree was only interlocutory, did not settle the issues between Wilhelmsen and the Thielbek, and left one-

half the case "up in the air"; that it was the duty of the court to dispose of all the issues, and the court had jurisdiction of the cause until he did dispose of all the issues, no matter how many decrees he rendered on other parts of the case, nor how many appeals may have been taken therefrom. Why is the decree of October 25, 1915, giving Wilhelmsen his damages, any more important or final than the decree of January 3, 1916, denying Wilhelmsen his damages against the Thielbek, and awarding the Thielbek costs? One is as necessary to a determination of the case as the other. We cannot be deprived of our right to have *our part* of the case decided, merely because the Port of Portland appeals from a decree on another phase of the case. (Benedict, 4th Ed., Secs. 466, 568.)

We have written this because it may be suggested that the Port of Portland's appeal from the first decree in case 6111 deprived the lower court of jurisdiction to make his later decree in favor of the Thielbek in that cause. We think we have shown this suggestion to be unsound. If, however, your Honors should decide otherwise, then obviously the decree of October 25, 1915, in cause No. 6111 is defective, since it does not dispose of the Thielbek's case; and if your Honors should reach the same conclusion as Judge Bean on the question of liability, then your Honors, in remanding the case below, should direct that a decree be entered which shall include dismissal of Wilhelmsen's libel against the Thielbek, and an award to the Thielbek of her costs, as found by the lower court.

In speaking of the decree of October 25, 1915, as interlocutory, we are not thrusting our noses into the controversy between the Port of Portland and Wilhelmsen, as to whether or not it is interlocutory so as to render the Port's appeal therefrom premature and abortive. That is a question which does not concern us. But it certainly is interlocutory so far as the Thielbek is concerned.

AMOUNT OF THE THIELBEK'S DAMAGES IN CAUSE NO. 6116.

The decree gave the Thielbek damages in the sum of \$12,805.26, with interest. Through an error in calculation, admitted by all parties, this was \$69.00 too little. It has therefore been stipulated that the amount of the Thielbek's damages shall include this item, and be raised accordingly to \$12,874.26, with interest until paid—this without regard to the question as to who is liable for this amount. If therefore your Honors conclude, with Judge Bean, that the Thielbek is entitled to her damages, we ask that your mandate direct that a decree be entered for the increased amount. The stipulation referred to is on page 147 of the Apostles.

ARGUMENT ON THE MERITS.

The Thode Fagelund committed four distinct acts of negligence, each of which contributed to the collision.

1. She lifted her anchor at 3:20 a. m. and started for sea at a time when she saw that the Dredge Chinook was swung directly across the channel and was blockading the northern half of it, and when she knew that by wait-

ing a few minutes until the Chinook should swing with her stern up-stream, the channel would be cleared of this obstruction and four hundred odd feet would thus be added to the room for passageway.

2. The Thode Fagelund was negligent when, approaching the Thielbek and Ocklahama on a diagonal course and having them on her starboard hand, she attempted to cross their bows, instead of obeying Rule VII of the pilot rules and blowing one whistle and directing her course to her own starboard to pass a-stern of them.

3. But when the Ocklahama had assented to the Thode Fagelund's request for a starboard to starboard passage, the Thode Fagelund was grossly negligent in not proceeding to carry out the passage agreed upon. Instead of doing so she reversed her engines and swung to her own starboard directly across the course which she had assigned to the Ocklahama and Thielbek but a few seconds before.

4. The Thode Fagelund was negligent in not blowing the three blasts required by law, to indicate she was reversing her engines.

We will discuss these acts of negligence in the order named.

THE THODE FAGELUND SHOULD HAVE WAITED UNTIL THE CHINOOK SWUNG CLEAR OF THE CHANNEL BEFORE SHE STARTED FOR SEA.

It is said at pages 48-49 of the Port of Portland's brief: "It is respectfully submitted that the true cause of the collision was the position of the Chinook in the

channel of the river. It is found by the trial court that this dredge was in such a position that vessels approaching from either side of her could not sight one another over her because of her height."

Pilot Nolan of the *Thode Fagelund* says that if the *Chinook* had not been there he would have seen the *Ocklahama* and *Thielbek* earlier (Nolan, pp. 925, 926; 929-931) and would have had more room for passage (Nolan, p. 794).

In view of this disposition to attribute the true cause of the collision to the *Chinook*, we ask—Why did not Nolan wait until the *Chinook* had swung clear of the channel before he lifted his anchor and started for sea? The *Chinook* was 450 feet long and was lying across a channel 1500 feet wide. In other words, the *Chinook* occupied a third of the channel. She was at anchor and swinging on the flood tide. A glance at the chart marked Nolan Ex. 4 (Apostles p. 1427) will show the time she occupied in swinging and that she was swinging fast, and that it would only have been a very short time until she would have tailed with her stern straight upstream and would have added 450 feet to the width of the channel. Nolan himself recognized the prudence of waiting until the *Chinook* had swung. His own ship was anchored only about 1000 feet above her, and he could see her plainly, and knew how she was swinging. (Nolan, p. 773). He knew she would soon swing so as to open up this channel clear. That he knew he should wait for her to swing is shown by his own testimony that he waited from 3 a. m. till 3:20 to raise his anchor, because "In the first place, the *Thode Fagelund* was not

headed down-stream; therefore it was necessary for me to wait until she swung with her head down the stream. *In the second place, the Chinook, laying as it was, crowded the channel, and it gave me a better opportunity to handle the vessel, and gave me more clearance to pass the dredge Chinook.*" (Nolan, p. 777). Referring to this testimony he said later: "*Said I didn't want to lift the anchor until the dredge Chinook had swung in the channel, and our ship also.*" (Nolan, p. 905).

And yet, though he is thus convicted out of his own mouth of knowing that prudence demanded he should wait, he waited only half long enough. Fifteen minutes more would have swung the Chinook clear. But he did not wait, and lifting his anchor started for sea *when the Chinook was directly across the northern part of the channel.* (Nolan Ex. 4, p. 1417). This was negligence. It was the want of that care which would have suggested itself to an ordinarily prudent navigator handling a loaded ship in a harbor where up-coming vessels were to be expected.

We did not charge this specific act of negligence in our libel and offered no proof of it. But when it became apparent from Nolan's own testimony, we asked leave to amend our libel to charge this as negligence. (Apostles pp. 972-973). The court never passed on our motion, since he found the Thode Fagelund negligent on other grounds. If your Honors should agree with us that the Thode Fagelund was negligent in this particular, then we ask that our libel may be deemed amended to conform to the proofs. (Benedict's Admiralty, 4th Ed., Sec. 413).

THE THODE FAGELUND WAS THE BURDENED VESSEL IN THE "FIFTH SITUATION" AND SHOULD NOT HAVE BLOWN TWO WHISTLES AND ATTEMPTED TO CROSS THE BOWS OF THE THIELBEK AND OCKLAHAMA. SHE SHOULD HAVE BLOWN ONE WHISTLE AND PASSED TO PORT.

In considering this question, it is of the utmost importance to get as nearly as we can the locations and courses of the respective vessels at the moment when they first saw each other. Upon their courses and locations at that instant depends Nolan's culpability or freedom from fault in blowing for a starboard passage. It is apparent that the vessels saw each other at about the same time. Nolan says that from the time he first saw the Ocklahama and Thielbek until he blew the first passing whistle was while a man would count one, two, three (Nolan, pp. 854-855) and this was corroborated by Captain Hansen, who says that the interval between the time he and Nolan first saw the Thielbek and Ocklahama, and the time of the first whistle, was two or three seconds (Hansen, pp. 497, 500) and that during this interval of time he walked three steps back and got his glasses and retraced his three steps (Hansen, p. 500). Pease says that he saw the Thode Fagelund "a few seconds" before she whistled, and, pressed for a more definite answer, said the interval of time might have been while a man might count ten (Pease, p. 1209). Eggars, the first officer of the Thielbek, saw the Thode Fagelund at the same time (Eggars, p. 368).

At this moment, then, when the vessels simultaneously saw each other, what were their locations and courses?

Pease says that the Ocklahama and Thielbek were 150 to 200 feet or so below the Calendar Dock and from one hundred and fifty to two hundred feet out in the stream (Pease, pp. 1126-1131) and their course, roughly speaking, was parallel with the dock line (Pease, pp. 1126-1134) and diagonal to the course of the Thode Fagelund, so that the red light of the Ocklahama showed to the Thode Fagelund, and the green light of the Thode Fagelund showed to the Ocklahama, and the Thode Fagelund's masthead range lights were quite open (Pease, pp. 1183, 1186, 1200-1202). We take Pease's location of himself at this instant as being comparatively exact, for he was close to the docks, recognized the Calendar Dock, and thus had an accurate means of fixing his position.

Nolan contradicts Pease's statement as to this course. Pease says only his red light was showing to the Thode Fagelund, which would put him on a diagonal course with the Thode Fagelund, while Nolan says that both the red and green lights of the Ocklahama and Thielbek were visible to him (Nolan, pp. 790-791) which would put these vessels on a course headed directly for the Thode Fagelund; but in this Nolan is certainly wrong. Not only do Pease and Eckhart say that their red light only would show to the Thode Fagelund and not only is Pease's course, as he has described it along the docks a probable one, and such a one as would show only his red light, but Captain Hansen and Chief Offi-

cer Hansen, *both* of the *Thode Fagelund*, agree with Pease. Captain Hansen says that at the first sight he saw two red lights on the *Ocklahama* and *Thielbek* (Hansen, p. 474) and that he saw the green light "later on." (Hansen, p. 475). His testimony is as follows:

"Q. Now from that position which you so occupied did you at any time see any other navigating light of the *Ocklahama* and *Thielbek* than those which you have described?

"A. *I saw the green one of the Thielbek later on.*

"Q. At what time with respect to the collision? I mean before or after?

"A. Why I guess I saw it about a minute or two before up till she struck.

"Q. So then I am to understand that the only change, if any, that was noted in the position or course upon which the *Thielbek* and *Ocklahama* navigated was one which a minute or two before the collision brought into view the green light of the *Thielbek*?

"A. Yes, sir, and the red was shut out."

The chief officer of the *Thode Fagelund*, J. A. Hansen, asked to tell what he saw, testified: "I saw two red lights and I sang out for them." (J. A. Hansen, p. 592). It is noteworthy that he nowhere mentions having seen a green light at this time.

Nolan himself testified that the green light of the *Thielbek* "opened" shortly before the collision, which makes it perfectly obvious that at the first sight it was

shut out. This testimony will be found on pages 801-802 and is as follows:

“Q. Now had there been any change noticed by you in the course of the Thielbek up to that time?

“A. Just at about the time the last danger signal was given the Thielbek’s port light—the Ocklahama’s port light had shut out that I couldn’t see it.

“Q. Then the Ocklahama’s red light was closed to you?

“A. Was closed to me, yes, sir, and the starboard light *opened*.

“Q. Of the Ocklahama?

“A. The starboard light on the Thielbek’s bow, sir.”

And while it is true that Nolan, on his cross examination, corrected this testimony and said it was a mistake, your Honors cannot fail to note that it agrees almost exactly with the testimony of Nolan’s own captain, Captain Hansen, as already quoted.

It is also worth noting that Nolan, when marking on the chart the location of the Thielbek and Ocklahama, when he first saw them, placed them on the course we contend for; and while it is true that he later corrected this, and said that he had only intended to mark their *location*, and not their *course*, still we think the angle at which he drew the two lines representing the Ocklahama and Thielbek, when taken in connection with the other testimony, has a certain significance. See Nolan Ex. 4, p. 1417.

Pease has testified emphatically as to the course of his vessel. He was right alongside the docks and hence could judge of his course in relation to them. And when he says he was paralleling the dock line (which would necessarily show only his red light to the Thode Fagelund) we must believe him—especially when supported by all the corroborating circumstances and testimony we have noted. Pease says that the Thode Fagelund was on his port bow approaching on a diagonal course. (Pease, pp. 1201-1202).

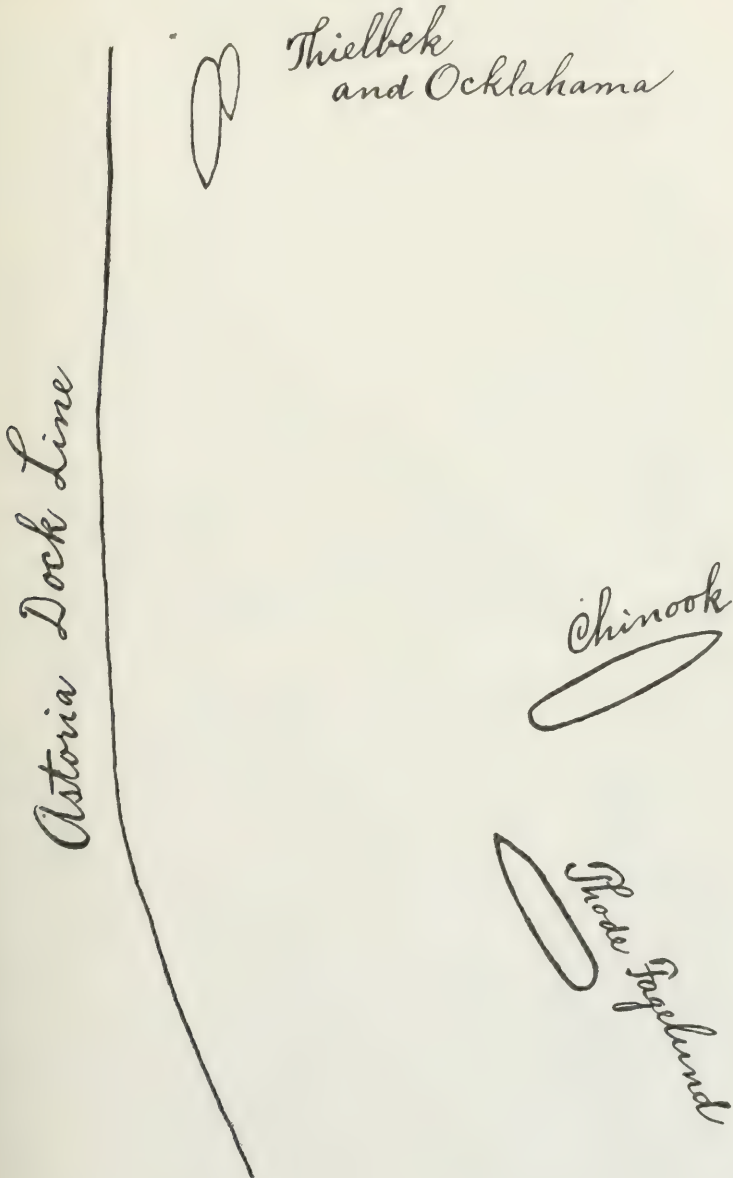
The Thode Fagelund, when she first sighted the Thielbek and Ocklahoma was, according to Nolan, on a course headed to clear the stern of the Chinook by about one hundred feet (Nolan, pp. 784-785 and 853-854), and her stem was about two hundred and twenty-five to two hundred and seventy-five feet distant from the stern of the Chinook (Nolan, p. 868), and the Chinook was lying diagonally across the channel with her stern toward the Astoria docks and somewhat up-stream, (Wilhelmsen, Nolan Ex. 4, p. 1417). Captain Hansen, of the Thode Fagelund, says that his ship was at this time headed on a course to clear the stern of the Chinook by one hundred and fifty to two hundred feet (Hansen, p. 496), and was distant from the Chinook "a couple of hundred feet" (Hansen, p. 495). Nolan further says that the course of his vessel at this time was for a point one hundred feet or a little more below the Calendar Dock (Nolan, pp. 784-785 and 853-854). He is probably mistaken in this and was probably headed for some point on the docks further up-stream, for if he had been headed for a point below the Calendar Dock he would

have been headed directly for the Ocklahama, and Pease would have seen the Thode Fagelund's red and green lights and her masthead lights would have been in line, whereas Pease says that the masthead lights appeared to him "open" and he only saw the green light; and he is corroborated in this not only by those on his own vessel but by *all those on the Thode Fagelund who all agree* that at this time the Thode Fagelund's *green light only was visible to the Ocklahama and Thielbek* (Nolan, pp. 839, Hansen, pp. 483-484). The vessels were at this time a quarter of a mile apart according to Pease (Pease, p. 1182); twelve to fifteen hundred feet apart according to Nolan and Captain Hansen (Nolan, p. 170, and Captain Hansen, p. 470). According to the scale of the chart on which Nolan has located the positions the distance was even greater. (Wilhelmsen, Nolan Exhibit 4, p. 1417), and Nolan says that "the plat is to control in distance" over his estimates (Nolan, p. 967). Captain Hansen says that the Ocklahama and Thielbek were about three-quarters of a point off the Thode Fagelund's starboard bow. (Hansen, p. 470) At another place, he says they were only half a point (Hansen, 517). Chief Officer Hansen says that they were about one-quarter of a point on the starboard bow (J. A. Hansen, p. 596). The speed of the Ocklahama and Thielbek was about six miles an hour past the land (Pease, p. 1202). The speed of the Thode Fagelund was very slow. It is alleged in Wilhelmsen's libel that the Thode Fagelund had "not yet gathered steerageway" (Apostles, p. 20). Nolan's written report, made soon after the collision, states that the Thode Fagelund "had very little more than steerage

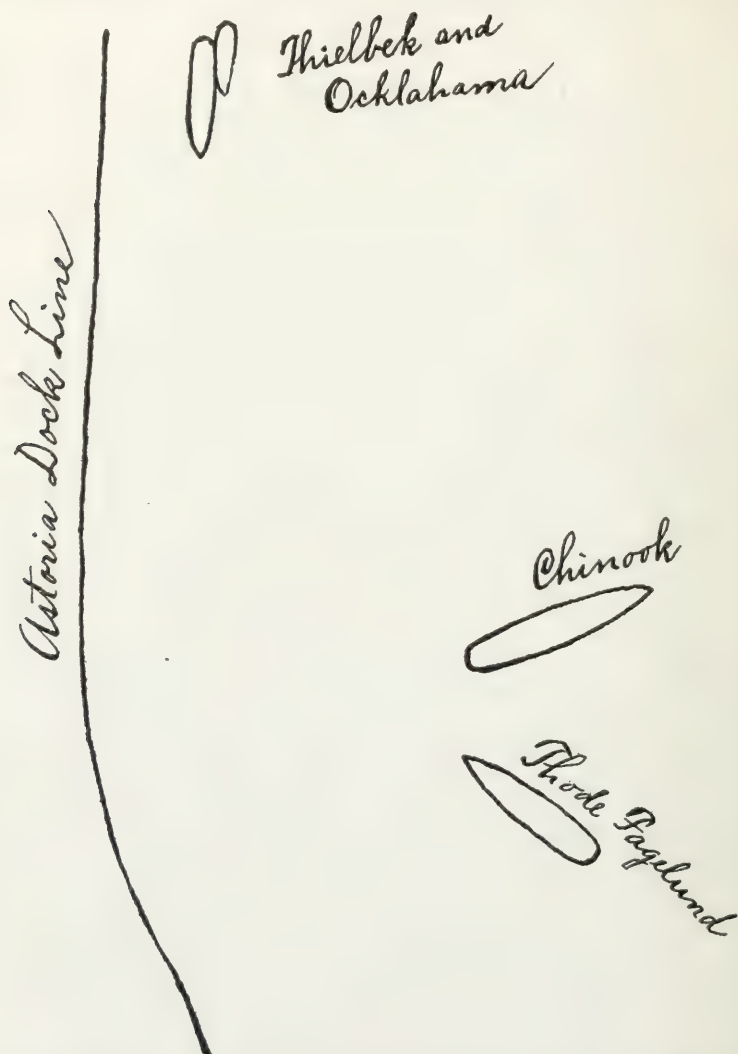
way on her" (Nolan, p. 901). Captain Hansen, in answer to a question by his counsel as to whether the Thode Fagelund had "more than mere steerageway," answered "that is all she had" (Hansen, p. 482). Nolan says that the Thode Fagelund "had just enough speed to be manageable on her helm" (Nolan, p. 796). Chief Officer Hansen, asked how far his ship traveled through the water between the answering whistle from the Ocklahama and the dropping of the Thode Fagelund's anchor, answered, "Well, hardly nothing." (J. A. Hansen, p. 612). Indeed her speed was so little that, according to Captain Hansen, she came to a "practical dead stop" before her anchor was let go, and consequently her anchor chain wouldn't run out (Hansen, p. 505); and a little later he says that before anchoring "She was stopped and was laying pretty near still." (Hansen, p. 512).

Summing up this situation, then, the ships, at the first sight, were something over a quarter of a mile apart, approaching on diagonal courses, with the Thode Fagelund as the burdened vessel and bound to keep out of the way, and the Thielbek and Ocklahama privileged to hold their course and speed. The Thode Fagelund had the Thielbek a half or three-quarters of a point on her starboard bow. The Thode Fagelund's stem was then distant from the stern of the Chinook a little over two hundred feet and she was headed on a course one or two hundred feet off the stern of the Chinook and for some point probably slightly above the Calendar Dock. Her speed was very little—barely steerageway. The Ocklahama's and Thielbek's speed was about six miles per hour. Judging from the testimony of those

on the Thode Fagelund, the positions seem to have been something like this:



or, according to those on the Ocklahama, more like this:



This situation is governed by Rule 7 of the Pilot Rules. That part of the rule which is applicable is as follows:

“When two vessels are approaching each other at right angles or obliquely so as to involve risk of collision other than when one steam vessel is

overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, *or, if necessary to do so, slacken her speed or stop or reverse.*"

Nolan did not obey this rule. Instead he blew two whistles and attempted to cross the bows of the Thielbek and Ocklahama. He excuses his conduct by saying that he could not blow one whistle and go astern of them, because he was too close to the stern of the dredge Chinook and could not clear the dredge's stern and at the same time assume the responsibility of passing to the port side or astern of the Ocklahama and Thielbek. Is this excuse a good one? It is clear that it is not for the following reasons:

The Thode Fagelund's speed being as little as it was—mere steerageway—she might even, by the mere stopping of her engines, have allowed the Thielbek and Ocklahama to pass on their course. The Thode Fagelund need not have altered her course toward the dredge a particle. All she need have done was to *stop*, which was easy, for she had only steerageway. The Ocklahama and Thielbek would then have passed along close to the Astoria docks, and after they had gone by, as they had a right to do, the Thode Fagelund could have resumed her course to sea. She *might* have done this even without reversing her engines. She *certainly* could have done it by reversing her engines, as is indicated by the

fact that when she *did* reverse her engines she came, as Captain Hansen says, to a "practical dead stop" *more than a hundred feet from the dredge Chinook (and in no danger of collision with her) and nowhere near the course that the Thielbek and Ocklahama would have pursued had Nolan not blown his two whistles and attempted to cross their bows.*

In The St. Johns, *infra*, 100 feet was held ample space for passing, and many more cases could be cited to the same effect.

The rule requires the burdened vessel (which was the Thode Fagelund) to keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, *if necessary to do so, slacken her speed or stop or reverse.* Why didn't Nolan do this? Why didn't he accept the position of the burdened vessel and act accordingly. He says he was afraid of the Chinook. *The very position of the Thode Fagelund at the time of the collision shows that this is not a good excuse.* At the time of the collision the Thode Fagelund, according to her own officers, was *stopped still in the water about one hundred and twenty-five or two hundred feet from the Chinook.* (Nolan's Ex. 6, p. 1419, and Captain Hansen, p. 523.) She hadn't in fact proceeded very far from where she was when she first saw the Thielbek. She came to a stop easily, and completely, yet a safe enough distance from the Chinook so as to be in not the slightest danger of collision with her. In short, she stopped and reversed and did exactly what she should have done *had she signaled for a port passage as the rule required*, and the result of what she

did—that is, the position she actually occupied after backing—shows that it would have been the easiest thing in the world for her to have occupied the same position in making the port to port passage as the rule required—in short, if she had acted as the burdened vessel. If she had done this, she would have stopped near the Chinook (*as she did*), but in no danger of colliding with the Chinook (*as she was not*), and the Ocklahama and Thielbek would have passed safely on their course over by the docks seven hundred to eight hundred feet away. “The proof the pudding is in the eating,” and what the Thode Fagelund *did* do under her reversing propeller, shows what she *could* have done under a reversing propeller, had she made the port to port passage, as the rule required. And in making that passage the rule requires her to *stop, back and reverse, if necessary*. You have only to plot the vessels on the charts, *at the time of the first sight*, and *at the time of the collision*, to see that if the Thode Fagelund had blown one whistle and reversed her engines, she would not have been in the slightest danger of colliding with the Chinook, and would have let the Ocklahama and Thielbek, as the privileged vessels, go safely on their way. It was not even necessary for the Thode Fagelund to port her helm to do this. For she *never did port it*, and yet she came to a stop alongside the Chinook.

But even if it had been necessary for Nolan, in order to make a port to port passage as the rules require, to put his helm to port and direct his course to starboard, he would not have been in any danger of colliding with the Chinook, for he was at that very time almost abreast

of her, and his course gave him a clearance between him and the stern of the Chinook of between one and two hundred feet.

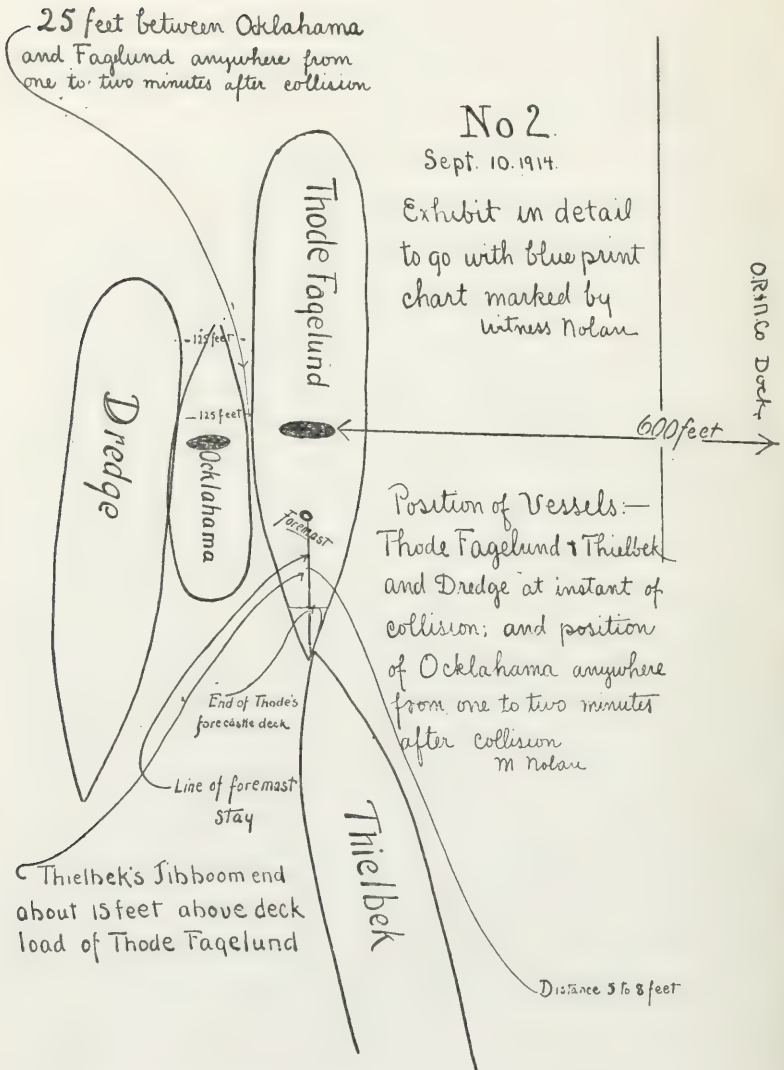
In support of this statement we point out that at the time the vessels first saw each other the "Thode Fagelund's" bow was about two hundred feet from the stern of the "Chinook," and the *course* of the vessel being from one to two hundred feet off the stern of the "Chinook," it is obvious that, even if it had been necessary for Nolan to put his helm to port at that instant, he *could not* have swung his vessel into dangerous proximity with the stern of the "Chinook" while he was going forward the short distance of two hundred odd feet. To have done so, he would have had to swing his bow to starboard nearly a foot for every foot that he went forward—and this against the tide on his starboard bow. But as a matter of fact it wouldn't even have been necessary for him to put his helm to port at that instant. He could have waited, if he had wanted to, until his bow was abreast the stern of the "Chinook" and then put his helm to port and could have easily cleared the "Thielbek" and "Ocklahama." That he could have done this easily is shown by the fact that it was only a few seconds after the *first whistle* until Nolan was *actually passing the stern of the "Chinook."* Captain Hansen shows this in his testimony on pages 500-502, where he says that the "Thode Fagelund" blew the second whistle four or five or six seconds after the first, and that at that time the *bridge* of the "Thode Fagelund" was abreast of the stern of the "Chinook." In other words, the "Thode Fagelund" was *actually passing the "Chin-*

ook" within five to ten seconds after she first sighted the "Thielbek" and "Ocklahama." It is obvious that under these circumstances she *couldn't* have collided with the stern of the "Chinook," even if she had had to put her helm hard a-port when she first sighted the "Thielbek" and "Ocklahama."

Nolan says that even if he could have got by the stern of the "Chinook" he could not have turned his boat to starboard enough to pass on the port side of the Thielbek and Ocklahama. Unfortunately for Nolan, however, we have shown that the turn which the Thode Fagelund actually *did* make under her reversing propeller shows that if he had blown one whistle and backed his engines (as the rule requires, when necessary), his boat could have passed the stern of the Chinook and passed to the port side of the Ocklahama and Thielbek very easily.

Your Honors have only to look at Nolan's Exhibit 6, p. 1419, and notice that the Thode Fagelund is practically *parallel* with the Chinook at the time of the collision, and then look at any other of the charts which show the Chinook's position in the river at this same time, and you will see that the Thode Fagelund, between the first sight and the collision, swung very sharply to her own starboard. For example, compare Nolan's Exhibit 6 with Nolan's Exhibit 7 (p. 1420). Here they are:

LIBELANT (WILHELMSEN) EX. 6 NOLAN

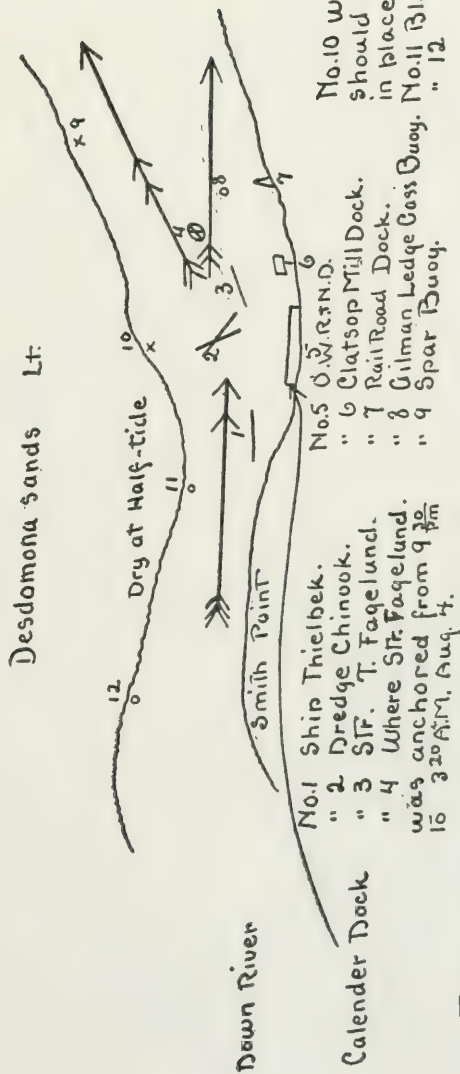


Filed Sept 11 1914 G H Marsh. Clerk.

Libeller Wilhelmsen.
Nolan Ex. 7.

Libellants Ex. 16
on Re-direct Examination
Cause No. 6111
AWP

about 2,000 feet



Filed Sept. 11, 1914. C.H. Marsh Clerk

Nolan's Exhibit 7 shows the position of the Chinook in the river at the time of the collision. The line, one end of which touches the figure 2, represents the Chinook at this time. (The line drawn across this and a little more athwart the channel represents her at the first sight.) Look at the position of the Thode Fagelund, *at the first sight*, as indicated by Nolan on this same chart, and your Honors will see that in order to get parallel with the Chinook at the time of the collision she would have to swing very sharply to starboard, and this is just what Pease says she *did* do. (Pease, p. 1194.) If she could do this by reversing her engines (and let it be noted that she did it against the influence of her helm, which was all this time hard astarboard), it needs no discussion to show that she would have had no difficulty in swinging in the same way to make a port to port passage as the rule requires. Nolan admits that the port to port passage was proper if the Ocklahama had blown first, because then, as he says, she would have assumed the responsibility for the passage. (Nolan, pp. 949-950.) This is wrong. If the Ocklahama had blown first and given one whistle, she would still have been the privileged vessel—would still have had the right to hold her course and speed and the Thode Fagelund would still have had to keep out of the way.

To sum up:

We have shown that Nolan could have *ported* his helm and passed safely without coming into dangerous proximity with the Chinook. But we go further and say that, if he was afraid of the Chinook, he did not

even need to port; his vessel having mere steerageway, he could have simply stopped his engines, or stopped and reversed, if necessary, and the Thielbek and Ocklahoma would have passed way over by the docks, while Nolan waited near the Chinook, but not dangerously close to her. That he could have done this is shown by the fact that he *did* do it, and did not come in dangerous proximity with the Chinook. If then there was nothing to justify his departure from the usual rule, he is clearly at fault for having done so. When he departed from the rule he assumed the risk, and that risk was not changed, nor did his vessel cease to be the burdened vessel, nor did the "Ocklahoma" and "Thielbek" lose their character of privileged vessels by the "Ocklahoma's" assent to his whistles. The law on this has been stated by some of the most eminent admiralty judges in the country in the following cases:

In the "Nereus," 23 Fed. Rep. 448, Judge Brown, of the Southern District of New York, said, page 455:

"A steamer bound to keep out of the way of another steamer by going to the right, under the inspectors' regulations, has no right, when under no stress of circumstances, but merely for her own convenience, to give the other steamer a signal of two whistles, importing that she will go to the left, unless she can do so safely by her own navigation, *without aid from the other, and without requiring the other steamer to change her course or her speed*. Otherwise she would be imposing upon the latter steamer more or less of the burden and the duty of keeping out of the way, which by statute is imposed on her-

self. When two blasts are given under such circumstances, the steamer bound to keep out of the way thereby in effect says to the other: 'I can keep out of your way by going ahead of you to the left, and will do so if you do nothing to thwart me; do you assent?' A reply of two whistles, in itself, means nothing more than an assent to this course, at the risk of the vessel proposing it. Such a reply does not of itself change or modify the statutory obligation of the former to keep out of the way as before, nor does it guaranty the success of the means she has adopted to do so. *The City of Hartford*, *supra*; *The Vanderbilt*, 20 Fed. Rep. 650.

"But from the moment that such an attempt apparently involves risk of collision, both steamers are equally bound to do all they can to avoid a collision; and under rule 21 they may each be bound to slacken speed, or to stop and reverse, according to the circumstances. But this general obligation under rule 21 applies equally whether the previous signals were of two whistles or of one. The precise acts which either is bound to do, when immediate danger of collision arises, must depend upon the particular circumstances, and of these circumstances the previous understanding as to the course or intention of each vessel is one of the most important. But where the circumstances are such that a course proposed by a signal of two whistles would, if assented to and adopted, require at once, as in this case, immediate and strong measures to avoid a collision, there can be no question that such a proposal is wholly unjust-

tifiable, and a gross fault, when proposed by a steamer that is bound to keep out of the way, and is under no constraint of circumstances, but free to pursue other safe methods of doing so.”

See also “The Greenpoint,” 31 Fed. Rep. 231, another decision by Judge Brown of the Southern District of New York.

In “The Admiral,” 39 Fed. Rep. 574, Judge Benedict, of the Eastern District of New York, said:

“This is an action brought by the owners of the water-boat Croton to recover for the sinking of that boat in a collision with the lighter Admiral that occurred in the East River on the 13th day of February, 1888. The Admiral was proceeding up the East River along the piers. The Croton was crossing the river from the New York shore, bound to the slip at Prentice’s Stores, on the Brooklyn side. An examination of the evidence shows the collision to have been occasioned by the fault of the Croton, and not by the fault of the Admiral. The Croton was on a course crossing the course of the Admiral, and having the Admiral on her starboard side. Although she, as she says, blew two whistles to the Admiral twice without receiving a reply, she kept on without change of course or speed, giving to the Admiral a third signal, to which the Admiral then replied by two. It is argued on behalf of the Croton that the failure of the Admiral to reply to her signal shows now that the Croton was not seen by the Admiral. If so, it showed the same thing then. The Croton, therefore, attempted to cross the bows of a

vessel near at hand, and known by her to be ignorant of her presence, and of course she assumed the risk of crossing in safety, without any action on the part of the Admiral. Again, when after the Admiral's delay to reply to two of her signals, upon receiving a reply to her third signal, she starboarded hard and opened her engine in an endeavor to cross the Admiral's bows, she took the risk upon herself, and failing is responsible for the result. The reply of the Admiral to her signal gave the Croton no immunity from the responsibility cast upon her by the law. A mistaken idea seems to be entertained in behalf of the Croton that it was a fault on the part of the Admiral to blow two whistles in reply to the two whistles of the Croton, unless it was the judgment of the Admiral that there was room and time for the Croton to pass ahead in safety. It was not for the Admiral, but for the Croton, to determine whether there was room and time for her to pass the Admiral's bows in safety. Her signal to the Admiral announced her determination of that question, and the reply of the Admiral simply informed her that her determination was known to the Admiral and constituted no fault. It is further claimed, on behalf of the Croton, that the Admiral was in fault, because, after blowing her two whistles in reply to the Croton's signal, she ported her helm, when, by starboarding, she would have assisted the Croton in her attempt to cross the Admiral's bows. The answer here is that it was no part of the duty of the Admiral to assist the Croton.

The limit of the obligation upon the Admiral was, when danger of collision appeared to her, to adopt such measures as she had at command to avoid collision. Upon the evidence I doubt whether it was a mistake on the part of the Admiral to port when the Croton starboarded to cross her bows, but if it was a mistake it is not to be laid at the door of the Admiral as a fault. If it was a mistake, and if in the absence of that mistake the Croton would have passed in safety, the mistake is not to be attributed to the Admiral, but to the Croton, whose unwise action alone required the Admiral to determine a question that otherwise would not have been presented. 'The libel must be dismissed, with costs.'

We do not contend that under no circumstances may the burdened vessel depart from the rule and blow two whistles and attempt to cross the bows of the privileged vessel. But we do say there are no circumstances in this case justifying such a departure. And the very position of the Thode Fagelund at the time of the collision shows that she could have made the port passage safely and without danger of collision with the dredge, and consequently was under no stress of circumstances which excused her departure from the usual rule.

The rule is statutory, and the Thode Fagelund must show, not only that her breach of it did not cause the collision, but that it could not have done so.

The Pennsylvania, 19 Wall. 125, 136.

The Martello v. The Willey, 14 Sup. Ct. Rep. 723, 727.

BUT WHEN THE THODE FAGELUND HAD BLOWN TWO WHISTLES FOR A STARBOARD TO STARBOARD PASSAGE AND HAD RECEIVED THE OCKLAHAMA'S ASSENT SHE WAS GROSSLY NEGLIGENT IN REVERSING HER ENGINES AND GOING TO HER OWN STARBOARD.

The testimony on this part of the case clearly shows that Nolan lost his head. Consider the time that elapsed between his second signal and the time he reversed his engines and thus made obedience to the signal impossible. Only about *six seconds*. A detailed statement of the signals, orders and times intervening is as follows:

Nolan sighted the Ocklahama and Thielbek and blew two whistles. About five seconds later he stopped his engines because he had received no answer (Nolan, p. 855). About five seconds after that (i. e., ten seconds after the first whistle) he again blew two blasts (Nolan, p. 858). This second whistle was promptly assented to by the Ocklahama (Nolan, pp. 858-859), and yet within *five or six seconds* after that, Nolan reversed his engines full speed astern (Nolan, pp. 859-860) and made the passage agreed on impossible. Captain Hansen makes the time even shorter. He says (p. 502):

"If I am not wrong he reversed them *before he blowed the second whistles*.

"Q. Before he blowed the second whistles?

"A. No, it probably was—it was probably afterwards, *just in the same instant*.

"Q. About the same time?

“A. The second two whistles, and then astern.

“Q. That is, he reversed his engines full speed astern at the time of the second whistle or immediately after the second whistle.

“A. *Immediately after, yes.*”

Mr. Tollefsen, the chief engineer of the Thode Fagelund, who was on duty in the engine room, corroborates this, for he says that “very quick” after he got the stop bell he got the bell for full speed astern. When it is remembered that the stop bell *preceded* the second two whistles, it becomes apparent that the reversing bell came within a very few seconds after the second whistle. (Tollefsen, p. 655.)

This act of Nolan’s — even if he were otherwise blameless—should fix the responsibility for the collision. It was absolutely necessary, in order to carry out the maneuver, that he had himself requested that he *go ahead* on a starboard helm. As Pease says, “what I wanted him to do was to *come ahead* on the starboard helm. That is what I wanted him to do.” (Pease, p. 1247.)

It was absolutely necessary that Nolan do this, if he were going to make the passage across the Thielbek’s bow, that he had asked for. And his two whistles, to which the Ocklahoma assented, meant that he *would* do this—meant that he considered it safe to cross their bows and that he would *go ahead* on a starboard helm. Yet within six seconds—so short a time that Hansen says it was “in the same instant”—after having asked to do this, he reversed his engines full speed astern, and stopped his vessel right in the path he had himself assigned to

the Ocklahama and her tow. Nolan asked Pease by his two whistles to come over toward the Chinook, letting him (Nolan) go over toward the Astoria docks. The collision occurred right next the Chinook in the very waters Nolan had invited Pease into, and the very waters which of all others Nolan should have been out of. All this was because Nolan reversed his engines. And there was nothing *in extremis* about this. The ships were a quarter of a mile apart in clear sight of each other.

This mere *stopping* of his ship right in the way of the Ocklahama was bad enough. But even this is not all. He did more than *stop*—he swung to *starboard*. Every seaman knows, and it is in the testimony here, that a right-handed propeller, backing, swings to her own starboard. Nolan knew it—knew that the Thode had a right-handed propeller and would swing to her own starboard, if he reversed her—that is, swing right toward the Chinook and make it *impossible* for the Ocklahama to pass. That Nolan knew the Thode had a right-handed propeller and would so swing is shown by the conversation between him and Captain Hansen, reported by the latter as follows: “When Captain Nolan told me to ‘back her full speed, Captain.’ ‘All right, sir. *She may turn on you, Pilot,*’ I said. ‘I know it, sir,’ he said, ‘but it can’t be helped.’ Or he said ‘Maybe it can’t be helped.’ That is all the conversation.” (Hansen, p. 520).

Hansen knew that the move was an improper one and dangerous, and, though he denies that he said anything further to Nolan, we think he said enough to show that he protested against the maneuver. That this action of Nolan’s was the immediate cause of the collision

we think there can be no doubt. Pease, assenting to Nolan's request, had swung his tug and tow to their own port and was heading directly for the stern of the "Chinook" to give Nolan six or seven hundred feet of water to execute the maneuver he had himself requested, and yet within five or six seconds, or as Hansen says, "in the same instant," Nolan changed his mind, decided the maneuver was impossible, reversed his engines and swung his boat eight points (according to Pease) to her own starboard directly across the course which he himself had assigned to the "Thielbek" and "Ocklahama." He made the collision inevitable. Nolan's own statement of the position of his boat at the first sight, two hundred feet or so above the "Chinook," headed to clear the "Chinook" by a hundred feet and for a point a little below the Calendar Dock, and his position at the time of the collision, as he has himself indicated it, and the hole in the "Thode Fagelund's" *port* bow, when she had asked for a *starboard* to *starboard* passage, all show how sharp the "Thode Fagelund" swung off her course under the influence of the reversing propeller and directly across the course of the "Ocklahama" and "Thielbek."

The admitted point of the collision should fix the responsibility for it without further argument. Nolan, by his two whistles, said: "I want to go over next the Astoria Docks." Pease, by his assent, said: "All right, go ahead. I'll do nothing to thwart you." Pease was entitled to hold his course and speed until risk of collision became apparent. But he didn't insist on the right. He yielded more than was required of him and *immediately*

started over toward the Chinook—indeed headed so close to her that he was backing his own engines to keep from colliding with her (Pease, pp. 1189-1190). Nolan on the other hand went *nowhere* near the course he had assigned to himself, the Astoria Dock side, but on the contrary, with six or seven hundred feet of clear water on that side for him to pass in, swung his vessel right underneath the Chinook's stern into the only place where Pease could possibly pass, and the collision took place within about a hundred feet of the Chinook. All this happened because Nolan reversed his engines, and what reason does he give for reversing his engines? One that is no good at all. He says that he reversed them because the Ocklahama and Thielbek did not appear to change their course (Nolan, p. 836-837). Mind you, within five or six seconds, or as Captain Hansen says, "in the same instant," after the exchange of the two whistles between the two boats, Nolan reversed his engines because the "Ocklahama" and "Thielbek" did not change their course. *They didn't have to change their course. As the privileged vessels they were entitled to hold their course* until it became evident that there was risk of collision by their so doing, in which case of course they would have to go to port, stop, reverse and do everything on their part to avoid a collision. But until it became evident to them that there would be risk of collision if they held their course and speed, they were entitled to hold it, and we submit that they should have been given more than five or six seconds to make up their minds whether there was risk of collision before Nolan should take it upon himself to reverse his engines. Further-

more, it *couldn't possibly* be apparent to Nolan, within that short length of time, whether the "Ocklahama" and "Thielbek" actually were changing their course or not. The "Thielbek" is a big barque three hundred feet long and though she was only in ballast and though the "Ocklahama" is a powerful tow-boat, Pease could not possibly in five or six seconds, have swung them to their own port sufficiently for Nolan to be able to tell whether they were changing their course or not. The only thing we can conclude from Nolan's statement is that he hastily jumped to the conclusion that the "Ocklahama" and "Thielbek" were not changing their course, without waiting to see whether they were or not, and he lost his head and gave the fatal order to reverse.

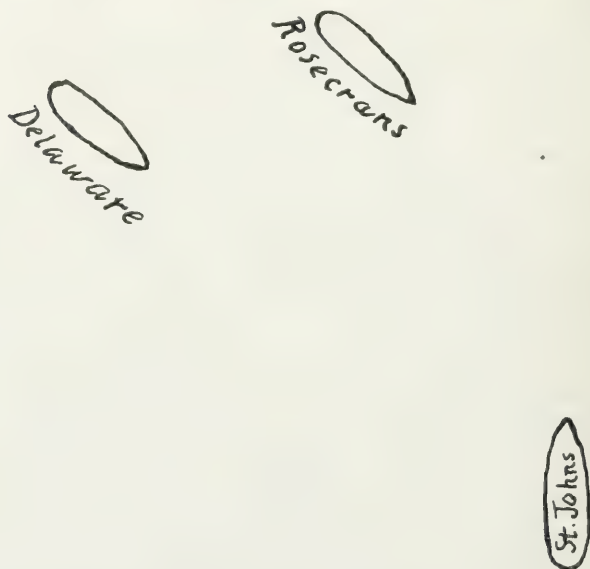
As a matter of actual fact, however, Pease was swinging his vessels to port *at the time of the exchange of whistles*, and as soon as he had answered the "Thode Fagelund's" whistle he swung his boats further to port as fast as he could (Pease, p. 1185). Pease's red light only was showing to Nolan at this time (in spite of Nolan's statement to the contrary) and in the five or six seconds in which Nolan concluded there was no change of course and that he would have to reverse, the green light on the Thielbek's starboard side hadn't had time to come into sight yet. That Pease *did* actually change his course, as he said he did, and *did* actually bear for the stern of the Chinook is *proved conclusively by the fact that the collision is admitted to have taken place right alongside the Chinook*.

Following are some cases holding it negligence for a vessel in the position of the Thode Fagelund to reverse her engines. They will be found directly in point.

The St. Johns, 34 Fed. 763,

Affirmed, 42 Fed. 75.

In this case the St. Johns was the privileged vessel, and the Delaware and Rosecrans, two tugs running on parallel courses, were off the St. Johns' port bow and were the burdened vessels. It was the "Fifth Situation" and the positions were something like this:



The Rosecrans blew two whistles to cross the St. Johns' bow, to which signal the St. Johns assented. The Delaware and the St. Johns had agreed that the Delaware should pass astern of the St. Johns as the rule required. The Rosecrans, instead of keeping on as she had agreed to do, reversed her engines when she and the

St. Johns were less than three hundred feet apart, and the St. Johns struck her.

In the District Court, Southern District of New York, Judge Brown held the Rosecrans at fault and said:

“Upon the above view it is clear that the immediate cause of the collision was the fact that the Rosecranz stopped in the water instead of keeping on in accordance with the previous understanding by signals. She was the vessel bound to keep out of the way. She selected her own mode of doing so. She adhered to this choice, and repeated it, after she knew that the St. Johns was to go ahead of the Delaware. It is plain that, had she kept on, she would have cleared the St. Johns on the latter’s starboard side by at least 100 feet, i. e., by as much space as the Delaware had on the St. Johns’ port side, and probably more; and that without any change of the St. Johns’ helm. This was sufficient space. The mode agreed on for avoiding each other was a proper one. Under this agreement, had the Rosecrans kept on, there would have been no risk of collision. The St. Johns, under such circumstances, owed no duty to the Rosecrans, except not to thwart her attempts to keep out of the way by going ahead as agreed, which the St. Johns did not do; and except that, after risk of collision appeared through the Rosecrans’ fault, she was bound to do what was possible to avoid her. *City of Hartford*, 11 Blitchf. 72, 75; *The Nereus*, 23 Fed. Rep. 455, 456; *The Vanderbilt*, 20 Fed. Rep. 650; *The Governor*, 1

Abb. Adm. 108; *The Greenpoint*, 31 Fed. Rep. 231. Even with this stopping by the *Rosecrans*, she lacked but 10 or 12 feet of clearing. There was no reasonable or apparent necessity for stopping contrary to the agreement under which both had been acting. The *St. Johns* had a right to rely on the *Rosecrans* keeping on as agreed; and stopping, instead of being 'necessary,' was the maneuver that tended to bring on collision, instead of avoiding it. Rule 21 has no application in such circumstances. *The Northfield*, 4 Ben. 112; *The Britannia*, ante, 546. For stopping, the *Rosecrans* must therefore be held to blame."

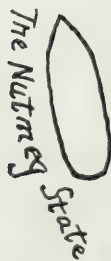
On appeal the Circuit Court affirmed this decision. Judge Lacombé's opinion is here given in full, 42 Fed. 75, 77:

"The findings, taken in connection with the opinion of the district judge, (34 Fed. Rep. 763) sufficiently indicate the grounds of affirmance. Had the navigation of both vessels been in accordance with their agreement, there would have been no collision. What, then, was the agreement, and who failed to keep to it? The *Rosecrans* and the *Delaware* being each in the "fifth situation" relatively to the *St. Johns*, which was on their starboard hand, were required by the rules to port, and pass astern of the *St. Johns*; the latter continuing on her course, and passing ahead. For some reason or other, the pilot of the *Rosecrans* disliked to take this course—probably because he was crossing an ebb-tide incumbered with a tow—and undertook to agree with

the St. Johns upon some other course. What thereupon occurred, as evidenced by the signals, was this: 'I want to cross your bow,' says the Rosecrans. 'I am going to cross the Delaware's bow,' is the reply; 'but if you wish to cross mine, you may.' 'I wish to do so,' responded the Rosecrans, 'and will act on your permission.' By this agreement, it became the duty of the Rosecrans to keep her course without unnecessary delay, and of the St. Johns not to thwart her, nor to intrude into the water through which the maneuver which the Rosecrans was about to undertake would in ordinary circumstances be carried out. Thereafter the St. Johns slows. She crosses the bow of the Delaware according to programme, and by as narrow a margin as she safely can. She then co-operates by starboarding. She does not intrude into the water which would have been required for the tug's maneuver, if executed as promised. She does, in fact, collide with the Rosecrans, but solely because of the latter's stopping. If what was ordinarily to be expected had happened, the water into which the St. Johns came would not have been at that time required for the maneuver the Rosecrans was making. Nor was the master of the Rosecrans justified in stopping by any fear as to the St. Johns' course. Nothing in the situation or in the latter's agreement was demanding an alteration of her course up to the time when the Rosecrans reversed. In this particular the case differs from that of *The Britannia*, ante, 67, which, both by the rule governing her situation, and by the promise of her signal, was required to alter her heading several points. This case is also to be distin-

guished from The Sammie, 37 Fed. Rep. 907. There the failure of the Burke to alter her navigation so as to co-operate with the Sammie was persisted in, without any apparent cause, for so long a time that the pilot of the Sammie was held excusable in reversing, contrary to his agreement, such maneuver being made in extremis. Here the St. Johns did alter her navigation to co-operate with the Rosecrans as soon as she could. It is true that by that time she was quite near the Rosecrans; but the master of the latter knew, when he made his agreement with her, that he must expect no stoppage or swinging to port from her until she had reached the Delaware's bow. Decision of the district court affirmed."

The Nutmeg State, 62 Fed. 847. This was the "Fifth Situation." The position was something like this:



The Monitor was the burdened vessel. She blew two whistles, to cross the bow of the Nutmeg State. The Nutmeg State assented. But the Monitor, instead of keeping on, slowed her engine, collision resulted, and she was held to blame.

Judge Brown delivered the following opinion :

“On the 26th of December, 1893, at about half past 2 in the afternoon, as the steamtug Monitor, with barges belonging to libelants in tow on each side of her, was coming down about the middle of the East river, in the ebb tide, she saw, when about off pier 49, the steamer Nutmeg State coming out of her slip at pier 35, on the New York side. When the latter had cleared her slip, the Monitor gave her a signal of two whistles, to which the Nutmeg State answered with two, signifying that she would go astern of the Monitor. The Pilot of the Monitor starboarded his wheel, but soon after slowed his engine, because, as he says, he did not see the Nutmeg State rounding to port as much as he expected, and he wished to have his engine in condition to back immediately, if necessary, without liability to catch on the center. Soon afterwards the Nutmeg State struck the side of the barge which was on the starboard side of the Monitor, and the shock damaged two boats on the Monitor's port side also. The above libels were filed against the Nutmeg State to recover the damages; and the Monitor was brought in as defendant upon the petition of the latter.

"I am satisfied upon the evidence that this collision was brought about by the act of the Monitor in slowing her speed, after she had given a signal of two whistles to the Nutmeg State, thereby, in effect, agreeing that she would go ahead of her. The evidence leaves no doubt that but for this slowing the Nutmeg State would have passed clear astern. The slowing of the Monitor was directly contrary to the meaning of her signal that she would go ahead. It was essentially a thwarting maneuver, which places upon her the fault for the collision. The Monitor was tardy in giving her signal; for though her pilot saw the Nutmeg State coming out before she was out of her slip, he delayed his whistle till she was well outside of it. *The St. Johns*, 34 Fed. 763, affirmed 42 Fed. 75; *The Britannia*, 34 Fed. 546, 556, affirmed 153 U. S. 130, 14 Sup. Ct. 795.

"I do not perceive that the Nutmeg State was to blame. The contrary maneuver of the Monitor in slowing was the last thing that the Nutmeg State was to expect. She had come out of her slip under a hard-a-starboard wheel, and kept it until collision. The river there being only about 1,300 feet wide, and the Monitor near the middle, there was very little space for the Nutmeg State to maneuver after she came out. She could not by reversing have stopped in time after the slowing of the Monitor was perceived; only 250 to 300 feet distant, she was already in extremis, and reversing would have brought her head to starboard and made a worse collision probable. I think under the special circum-

stances the master's judgment was correct; that his only chance of escape was to continue on with a hard-a-starboard wheel. That he did not escape was not his fault, but the Monitor's.

"The libelants are, therefore, entitled to judgment against the Monitor; and the Nutmeg State is discharged.

"Decree accordingly."

The Northfield, 4 Benedict, 112, Fed. Cas. No. 10, 326. In this case the vessels were in this situation:

Northfield

Hunter

The Northfield, as the burdened vessel, was going to keep out of the way by passing astern of the Hunter, and was swinging to do it. The Hunter was bound to keep her course. But when about three hundred yards distant from the Northfield, the Hunter, instead of keeping her course, stopped her engine and backed, and thus remained in the very water through which the Northfield had expected to pass.

Judge Blatchford held the Hunter solely to blame

and the case was affirmed by the Supreme Court of the United States, 14 Sup. Ct. Rep. 1184.

The *Britannia* and The *Beaconsfield*, 14 Sup. Ct. Rep. 795. This also was the "Fifth Situation. The vessels were something like this:

Britannia

Beaconsfield

The *Britannia* was the burdened vessel, and bound to keep out of the way by going astern of the *Beaconsfield*. The *Beaconsfield* was privileged and should have held her course and speed. The facts are thus stated by the court, page 797:

"The *Beaconsfield* descried the *Britannia* when the latter vessel came around Governor's Island, and about the time she was disengaging herself from the ground. The *Beaconsfield* thereupon blew a single blast of her whistle, which meant that she expected the *Britannia* to pass under her stern. It is

found that this whistle of the Beaconsfield was neither heard nor seen on the Britannia, but the latter's whistle, given while getting clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own whistle. It is thus evident that the pilots of both vessels agreed in the view that the proper thing to avoid collision was for the Britannia to swing to starboard, and pass behind the Beaconsfield. It is next found that the Beaconsfield, when she blew her first whistle, put her helm to port a little, and went on at a slow speed. Her observation of the Britannia did not show that the latter was swinging to starboard, but even was disclosing a little more of her starboard side to the Beaconsfield. Thereupon the latter blew another single whistle, which still signified her expectation that the Britannia would pass astern, and, hearing no answer, put her wheel hard a-port, and stopped her engines, and reversed full speed. Her engines were kept reversed until her headway was stopped. Then her engines were stopped, and, at the time of the collision, she was nearly, if not quite, dead in the water. After her headway was thus stopped, the Beaconsfield took no further action, and lay still in the water until struck. The time for such stopping of her headway until the collision, during which she lay still, was about a minute and a half. It is further found that, if the Beaconsfield had not stopped and backed, it is probable that the Britannia would have passed a short distance astern of her; and, in-

deed, under the finding as to her rate of speed before she stopped, this is quite evident.

“Was this behavior of the Beaconsfield in stopping her headway and remaining still, without further effort, for a minute and a half, proper, or, at least, excusable, as held by the circuit court? Or was it improper, and did it put her in contributory fault, as held by the district court?”

This question the Supreme Court itself answered as follows:

“The disregard by the Beaconsfield of the Britannia’s signal, her failure to obey the rule and keep her course, and her supine negligence in remaining motionless for so long a period, while she saw the Britannia approaching her, clearly put her in fault.”

The *William Chisholm*, 153 Fed. 704. Two steamers, the *Chisholm* and the *Oceanica*, were approaching end on, or nearly so. When within fifteen hundred or two thousand feet of each other, after some preliminary whistling, they exchanged two blasts, and agreed on a starboard to starboard passage. The *Oceanica*, however, either through a wrong helm or stopping and backing her engines, continued to swing to her own starboard contrary to the whistles she had given, and collided with the *Chisholm* eight hundred feet to starboard of the course on which she had been proceeding. The *Oceanica* was held solely to blame. Judge Severens said, in the course of his opinion, page 711:

“The darkest part of the case is the conduct of the Oceanica after the time when she gave her two-blast signal, and when she saw the Chisholm turning out abruptly on her hard astarboard wheel. There was no reason why she should not have turned to port and proceeded in accordance with her response. There was even less danger in doing that than in remaining where she was or in checking and backing, which would have a tendency to throw her stem to starboard. She gave testimony tending to show, and her counsel argues, that she nearly stopped in her course and remained almost dead on the line where she was, overcoming her progress by checking and backing, and that while she was doing this she was struck on her stem by the broadside of the Chisholm; but there were strong indications which discredit even this story, *faulty as this conduct would have been.*”

THE THODE FAGELUND WAS NEGLIGENT IN NOT BLOWING THE THREE BLASTS REQUIRED BY LAW TO INDICATE THAT SHE WAS REVERSING HER ENGINES FULL SPEED ASTERN.

The rule is embodied in Article 28 of the Act of Congress of June 7, 1897, and is as follows: “When vessels are in sight of one another, a steam vessel under way, whose engines are going at full speed astern, shall indicate that fact by three short blasts on the whistle.” The Thode Fagelund did not observe this rule, and her failure to observe it contributed to the collision, because

it left Pilot Pease of the Ocklahama completely in the dark as to why the Thode Fagelund was continuing to swing to her own starboard and toward him, instead of to her own port and away from him, as her two whistle signal had indicated she would do. If Pease had received a signal of three blasts from the Thode Fagelund, when the vessels were a thousand feet apart, he would have known she was backing and would keep swinging to her starboard, and it is possible that by blowing the danger signal, followed by one blast, and directing his course to starboard, he could have allowed the Thode Fagelund to continue on her starboard swing under her reversing propeller and the vessels *might* have passed safely port to port; but as long as Pease was in the dark as to why the Thode Fagelund kept swinging to her own starboard, he obviously could not attempt to change the maneuver they had agreed on, for he expected that any instant the Thode Fagelund would stop swinging to starboard and bear off to her own port in accordance with the two whistle signal she had given.

Pease's testimony shows how inexplicable to him was the Thode Fagelund's continued swinging to starboard and that he expected her every minute to commence to swing to port as agreed, and also shows what he might have done had Nolan blown the three blasts. Pease says (pp. 1246-1247) :

"A. I said that I thought his backing—

"Q. Was the cause of the collision?

"A. (Continuing) had a good deal to do with the cause of the collision, yes, sir. What I mean, at

the time of the collision, I didn't know whether he was backing or what he was doing, but this is from after we found out these things. Of course, now, although I have heard—excepting from just the testimony I have heard, is the only reason that I know he was backing. At the time of the collision, he was swinging to the his starboard. I couldn't tell why he was swinging to his starboard, when he told me in so many words he was going to his port. Later on, when I heard the testimony that he was backing that gives me a reason for why he was swinging to his starboard.

“Q. Did you tell Nolan you were backing?

“A. No, sir.

“Q. Why not?

“A. For the simple reason I could handle my tow in backing.

“Q. Don't you claim Nolan should have told you he was backing?

“A. Yes, I do.

“Q. You do?

“A. Yes, sir.

“Q. So you didn't have to tell Nolan that you were backing, but Nolan had to tell you that he was backing?

“A. In fact, I am supposed to state—when your vessel is going astern, you are supposed to say—to give three whistles. I am supposed to, as well as Captain Nolan is supposed to, and another thing—

“Q. But neither one of you did it in this case?

“A. Neither one of us did it. And my reason for not doing it is, of course, as it says here in this risks of collisions, anybody is allowed to go against them if they want to. In fact, I didn’t want Captain Nolan to know I was going astern. I could handle my vessel the same going astern as I could going ahead, and if I told him I was going astern, probably the first thing he would do would be to start going astern himself. What I wanted him to do was to come ahead on the starboard helm. That is what I wanted him to do.”

And again Pease testified on the same subject as follows (pp. 1294-1295):

“Q. What could Nolan have done to avoid the collision?

“A. Nolan could have blown three whistles when we were a good distance apart.

“Q. That would have avoided the collision, would it?

“A. No, but it would have given me a chance to know why he was swinging to starboard.

“Q. But you say you couldn’t have executed any maneuver at that time, to have avoided the collision?

“A. No, sir.

“Q. All right. If that be the case, what difference would it have made, if Nolan blew you three whistles, or any other old number?

“A. That would have given me a chance to do something else I couldn’t do otherwise.

"Q. Then if Nolan blew three whistles, you would have had a chance to do something else?

"A. I could.

"Q. Because Nolan didn't blow three whistles, you didn't have a chance to do anything else?

"A. No, sir.

"Q. Is that right?

"A. That is right.

"Q. That is your full explanation. Now, if you want to explain that, Archie, I want you to do it.

"A. Now, here. If he signaled to me when we were a good distance apart, that is, before he blew the danger signal, which I say—if the danger signal had been three whistles instead of the danger signal, it wouldn't have been time enough for me to do anything, but if he had blown three whistles when we were a reasonable distance apart, then I could not have cross signaled him, but it would have given me a reason to know he is going full speed astern and, as long as he is going full speed astern, he is going to swing to his starboard; I could arrive at it that way. I may blow a danger signal and one whistle; 'If you are backing up, it is causing you to go to starboard. Will you let me go on the other side?' And I couldn't swing and go the other side of him unless I blew the danger signal and one whistle."

Nolan's failure to blow three blasts contributed to the collision. He committed a breach of a positive statutory rule; and, under the doctrine of *The Pennsylvania*

and following cases, The Thode Fagelund must show, not only that his fault was not one of the causes of the collision, or probably was not, but that it could not have been the cause.

The Pennsylvania, 19 Wall. 125, 136.

The Martello v. The Willey, 14 Sup. Ct. Rep. 723, 727.

The Oregon, 27 Fed. 751, 758.

NOLAN INCOMPETENT.

Nolan appears to have broken most of the rules of navigation that night. In addition to the faults which we have pointed out, he put his helm hard astarboard and commenced to swing his vessel across the bows of the Thielbek and Ocklahama even *before* he blew the first two whistles. (Nolan, p. 859.) In another part of his testimony he changes this to say that he put his helm hard astarboard just after or about the time of the first two whistles. But this makes no difference. As the burdened vessel he had no right to attempt this maneuver until he *obtained the assent of the Thielbek and Ocklahama*. According to his testimony most favorable to himself, *he did not wait for that assent*, and according to part of his testimony he acted *before he had even asked for that assent*.

Nolan's failure to understand what was required of him is nowhere better illustrated than by his utter lack of appreciation of the fact that when he blew two whistles and asked for the starboard passage, he should have calculated where the Thielbek and Ocklahama would pass him in relation to the stern of the dredge

Chinook. He should have asked himself: "How much room will there be between me and the Chinook for the Ocklahama and Thielbek to go through?" If there was one thing he should have known it was that. According to him the stern of the dredge Chinook was the key to the whole maneuver. He asked the Ocklahama and Thielbek to go between him and the stern of the Chinook, and yet he never thought of the point where the passage would be made. He didn't know whether it would take place just as he was passing the Chinook so that the Ocklahama and her tow, with a total beam of seventy-nine feet, would have to crowd through the one hundred odd foot space which he left them, or whether it would take place below the stern of the Chinook, after the Fagelund had passed her and in a more open space. He says he relied on the tide striking his starboard bow and setting him farther away from the Chinook, and thus widening the passage through which the Thielbek and Ocklahama could pass. Yet he cannot tell even approximately what the tide was nor how far it would set him over. The truth is, Nolan, in so vital a matter as to where the passing point would be in relation to the stern of the Chinook, can tell us nothing about it. See his testimony, Nolan, pp. 868-872. Our deductions from this testimony are that while fearful of getting nearer the stern of the Chinook than one hundred odd feet himself, he was quite willing to force the Ocklahama and tow, with their combined beam of seventy-nine feet, to pass in that same one hundred odd feet. (For the beam of the Ocklahama and tow see Bergman, p. 304 and Pease, p. 1188.)

THE "THODE FAGELUND" WAS THE
BURDENED VESSEL AND BOUND TO KEEP
OUT OF THE WAY FOR TWO ADDITIONAL
REASONS.

Steamers being more easily handled than any other kind of vessel are bound to keep out of the way of a tug encumbered with a tow. This rule is declared in the case of "The Syracuse," 9 Wall. 672, 675, and has ever since been adhered to. Indeed Spencer, in his work on Marine Collisions, goes so far as to say that a tug with a heavy tow, is to be treated with the same regard as is shown a sailing vessel, his statement being:

"As between a steamer and a tug, with a heavy tow, the tug and tow are to be treated as a sailing vessel and the duty of avoiding them is imposed upon the steamer."

Spencer on Marine Collisions, top of page 265.

The rule is also well settled that a steamer, proceeding against the current, must make way for one coming with the current. The rule is based upon the well known fact that a steamer going against the current has better steerage way and better control over her movements than one coming with the current.

"Where, in order to avoid a collision between two vessels propelled by steam, one going with, and the other against the tide, it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be

controlled with less difficulty than those of the other vessel."

Head note to the *Galatea*, 92 U. S. 439.

In the case at bar the tide was flooding, and the "Ocklahama" and "Thielbek" were coming with the current and the "Thode Fagelund" was going against it. As such the "Thode Fagelund" was bound to keep out of the way of the other two.

THE PORT OF PORTLAND'S CONTENTION THAT NOLAN'S ACTS, WHILE CAUSING THE COLLISION, DO NOT CONSTITUTE NEGLIGENCE BUT WERE MERE ERRORS OF JUDGMENT.

This contention of the Port of Portland will be found on pages 39 to 50 inclusive of its brief. If we have made the foregoing part of this brief clear, Nolan's acts amount not only to negligence but to gross negligence. He was negligent when he lifted his anchor and started to sea without waiting for the Chinook to swing. He was negligent when he blew for the starboard passage, when the circumstances show that he could have made the port passage, and when he admits that he could have made the port passage if the Ocklahama had blown first. His failure was a breach of a statutory duty and he must show not only that it did not cause the collision, but that it could not have caused it. He was grossly negligent when, having been accorded the starboard passage he asked for, he reversed his engines and made that very passage impossible. Finally

he was negligent in not blowing three whistles to indicate that he was backing, and this too was a breach of statutory duty and the Thode Fagelund must show that it could not have caused the collision.

The cases cited by proctor for the Port of Portland are not in point. We cheerfully invite your Honors to inspect them. The facts will be found so different that those cases merit no consideration. The two upon which the proctor for the Port places the most reliance are *Reeves, et al. vs. the Ship Constitution*, Gilpin's Rep. 579, and the *Grace Girdler*, 7 Wall. 196.

In the *Grace Girdler* a schooner ran down a pleasure yacht which, in attempting to avoid a ferry-boat, unexpectedly got in the way of the schooner. The schooner had her sails slack and was *powerless* to control her movements at that moment. An independent witness, Captain Barber, who was on another schooner close by and witnessed the collision, said: "I don't see as the *Grace Girdler* could do anything to prevent this collision," and the court adopted this view. In the words of the court, the yacht "suddenly thrust herself before the schooner and took the latter by surprise." It is plain that the court was of the opinion that there was not even a mistake of judgment here and that the collision was unavoidable. The language quoted in italics in the Port of Portland's brief, namely—"If there was any omission, under the circumstances it was an error and not a fault. In the eye of the law the former does not rise to the grade of the latter, and is always venial"—refers not to the schooner, which was the vessel being proceeded against in the case, but to the libelant's own

boat, the yacht, and is nothing more than a dictum. We concede that it states the law correctly but it had no particular application to the case. It is noteworthy too that the Chief Justice and two of the Justices dissented.

In *Reeves* against the Constitution, the pilot, going along close to the dock line, saw a schooner heading in for the docks across his course. Behind the schooner, which was crossing his course, were several others, some at anchor and some under way. He was suddenly confronted with the alternative of passing in front of the schooner or going astern of her. If he passed in front, between her and the docks, it was a close call but he had a *chance* to make it and he nearly did make it. The event proved that a half minute's time either way would have enabled him to pass in front of her in safety. If he had gone astern of her he would have *certainly* come into collision with some of the other schooners which were there lying at anchor or cruising. It will therefore be seen that he adopted the best course and did not make even a mistake of judgment. That this is so is shown by the testimony of Mr. Maule. Maule was a passenger on the tug and was himself a pilot. He was standing in a position to see the whole collision. He was, therefore, the most reliable witness in the case for he was not only an independent witness but he was a pilot himself, and he said: "The ship took the straight course; that she had, or was obliged, to go inside of the schooner, and he thought there was room enough to do so without touching her, and there would have been if her jib-boom had been rigged in. He thought they

could not have gone astern *without running into more vessels* than they did; that there was no chance of going astern of her. He says, that it was the schooner's fault that she came in collision with the steamboat; if she had stopped one-half minute, we should have gone clear of her," and the court added: "And I may say the manner of the contact and injury proves this to be true."

It will be seen from this testimony that the tug had no other alternative than to do what she did and it was not even a mistake of judgment. If she had gone to the left she would have certainly run into the other schooners. Even at the time of collision, when the schooner had widened the space between herself and those astern of her, the closest one to her was only *fifty yards* and that fifty yards is the estimate of Captain Roth, a witness who was anxious to make the distance as great as possible.

Consider how different this is from Nolan's case, who, if he had kept on going on the course he had himself asked for, and had not changed his mind and reversed his engines within six seconds after asking for that course, would have had *six or seven hundred feet* of clear water to go through.

The other cases cited by proctor for The Port of Portland are so dissimilar in facts from this case that we do not deem it necessary to take space to comment on them. An examination of them, however, will show that in practically all of them there was not even a mistake of judgment, but the court says that even *if* there were, it did not constitute a fault.

The suggestion seems to be made in the Port's brief

that Nolan's acts were done in extremis, for it is said therein, on page 47, "the situation indeed when they got a full view of the Thielbek and Ocklahama was one of surprise." Now this is not true. Pilot Nolan and Captain Hansen had a full view of the Thielbek and Ocklahama from the very first. They distinctly say that they saw them clear of the dredge and that they were then *fifteen hundred feet away from them* and indeed as they have located their positions on the chart, the distance was greater. Nolan had plenty of time to select his course. He and Captain Hansen saw the Thielbek and Ocklahama "distinctly plain" (Nolan, p. 786). Captain Hansen said: "There is a tow coming up there pilot," to which Nolan answered: "I see Captain" (Hansen, p. 500). Hansen stepped back two or three paces, got his glasses, retraced his steps, and by that time Nolan had blown his first two whistles (Hansen, p. 500). These were not answered and Nolan stopped his engines (Hansen, p. 500, Nolan, p. 855), and about ten seconds after the first two whistles, blew two more which were promptly answered (Nolan, p. 859). It is obvious that his selection of this course was deliberate and not hurried. When he had selected that course it was his imperative duty to follow it, and Pease had a right to rely on his following it.

Proctor for the Port, in his effort to argue that Nolan's acts were mere errors of judgment, says that Captain Hansen, standing on the bridge by Nolan, approved his every action and gave Nolan a letter of exoneration. If we construe Captain Hansen's testimony correctly, he did not approve everything that

Nolan did. Captain Hansen knew that backing the engines was wrong and practically told Nolan so at the time. The instant the order was given he protested to Nolan in these words: "She may turn on you Pilot" (Hansen, p. 520). It is true that afterwards he gave Nolan a letter of exoneration. It is worth remembering in that connection, however, that Captain Hansen and the Thode Fagelund have got to defend Nolan in order to defend themselves against Knohr & Burchard's libel, for if Nolan was negligent the Thode Fagelund is liable.

The China, 7 Wall. 53.

There is moreover the natural human tendency of the captain to defend his own ship and his own pilot, especially when he, himself, was on the bridge with the pilot and so may be regarded as partly responsible for the handling of the ship. Furthermore Wilhelmsen's libel, as originally drawn, was all based on the theory of the Ocklahama's negligence. Obviously therefore Captain Hansen, in trying to support the case made by his libel, could not admit that his own pilot was to blame.

If the Thode Fagelund can hoist her anchor prematurely without waiting for the Chinook to swing clear, and, on sighting the other vessel more than fifteen hundred feet away on a clear night, can blow for the wrong passage, when under no stress of circumstances to do so, and, being accorded that passage, and with six or seven hundred feet of clear water ahead of her to make it in, can then immediately reverse her engines so as to make the passage impossible, and can than fail

to blow three whistles, as required by law, to indicate that she was reversing, all the while too being the burdened and not the privileged vessel—if she can do all these things, and then escape paying for the losses which her actions caused to innocent parties, on the ground suggested by proctor for the Port that everything she did was “only an error of judgment”—then certainly no libelant need ever hope to recover. We have shown clearly that there was nothing in extremis about this—that at the time Nolan reversed his engines he was nearly, if not quite, a quarter of a mile away from the other ship. But even if it had been in extremis, the Thode Fagelund by her own faulty conduct had put herself there, and can not escape the consequences of her actions while in that position.

The *Elizabeth Jones*, 112 U. S. 514.

THE THODE FAGELUND IS LIABLE IN REM FOR KNOHR & BURCHARD'S DAMAGES AND COSTS EVEN THOUGH SHE WAS NAVIGATED BY THE PORT OF PORTLAND'S PILOT.

It is argued in the brief of the proctor for Wilhelmsen, on pages 130 to 132, that, conceding Pilot Nolan was negligent, Knohr & Burchard, Nfl. should not have a decree against the Thode Fagelund *in rem*, but should be restricted to a decree against the Port of Portland *in personam*, since Nolan was the Port of Portland's servant and, to quote the proctor, “the rule of *respondeat superior* as to Wilhelmsen is not satisfied because Nolan was not an employee of Wilhelmsen.”

The law, however, has long been settled contrary to the proctor's contention by the case of *The China*, 7 Wall. 53. In that case the Supreme Court of the United States held a vessel liable for a collision, though she was being navigated by a pilot whom she had been *compelled* by a compulsory state pilotage law to take on board. There is no compulsory pilotage law in Oregon and the *Thode Fagelund* was not obliged to take Pilot Nolan on board. In *The China* the court pointed out that the law of *respondeat superior* has no application; for the responsibility of a vessel for torts committed by it is not derived from the law of Master & Servant or from the Common Law at all, but from the Maritime Law, which impresses a maritime lien upon the vessel, in whosoever hands it might be, for torts committed by it. In other words, the vessel is the offending thing. In this particular case it would work a great hardship on Knohr & Burchard, Nfl. to compel them to look to the Port of Portland alone for compensation. The Port of Portland is contesting liability on the grounds that its acts were *ultra vires*, and plainly states in its brief that its tax levying power may not be sufficient to enable it to raise the sums necessary to pay these damages; and it is well known that none of its physical property can be seized, but that the only remedy of a judgment creditor of the Port would be to mandamus the Commissioners to levy taxes to pay the judgment. Contrasted with these difficulties, Knohr & Burchard, Nfl. are proceeding against the *Thode Fagelund* *in rem* and have secured the usual admiralty stipulation to abide the decree and pay any damages which may

be awarded. They rely on this stipulation and insist on the doctrine of the China being applied here for their benefit.

A FEW COMMENTS ON WILHELMSSEN'S BRIEF.

Most of the foregoing brief was written before the writer had had an opportunity to read the brief of proctor for Wilhelm Wilhelmsen. A few things therefore require brief notice. It is suggested therein, on pages 38 and 136, that the court disregarded the theories of all the proctors in the case, and formed a theory of its own on which it held the Thode Fagelund and Pilot Nolan negligent. We must take exception to this, for we have some pride in the fact that the court adopted our own theory of the collision. The court held Nolan negligent for reversing his engines and going to starboard, especially when he did not signal that fact with three whistles. This was exactly what we alleged against the Thode Fagelund, the allegations in Knohr & Burchard's libel being found on page 159 of the Apostles and being as follows: "and was negligent in blowing two (2) whistles and attempting to cross the bow of the "Ocklahama" and tow when the red light of the "Ocklahama" was showing to the "Thode Fagelund," and the green light of the "Thode Fagelund" was showing to the "Ocklahama," thus indicating that the vessels were approaching diagonally and that the "Thode Fagelund" had the "Ocklahama" and tow on her starboard hand; but, when that course had been agreed upon by the exchange of signals aforesaid, the "Thode Fagelund" was

grossly negligent in altering her course more and more to her own starboard to such an extent that she crowded the "Ocklahama" and "Thielbek" so close to the "Chinook" as to make a collision between these vessels and the "Chinook" imminent, and to such an extent that she received the blow of the "Thielbek" on her port bow. That libelants are informed and therefore say that the "Thode Fagelund" reversed her engines full speed astern shortly before the collision; that if this is true the "Thode Fagelund" was negligent in that she did not blow three whistles to indicate that she was thus backing, as required by the rules of navigation."

It is sometimes suggested in Wilhelmsen's brief that the collision was a head-on collision, and, roughly speaking, it was so. It was hardly so, however, to the extent indicated by the following language on page 118 of the brief: "The rent in the Fagelund's bow, and the turning of her stem to starboard show that the vessels came together so nearly head-on that another foot would have put the Thielbek to the starboard or right side of the Thode's stem." The fact appears to be that the Thielbek struck the Thode Fagelund on the latter's port bow at an angle of five or six degrees. This is the testimony of the chief officer J. A. Hansen, who was on the Thode Fagelund's bow at the time (J. A. Hansen, pp. 599 and 629). See also the various diagrams (pp. 1419, 1424, 1425).

It is suggested on pages 111 and 112 of the brief that Pilot Pease, of the Ocklahama, instead of persisting in his course toward the stern of the Chinook, should

have changed the whole maneuver that had been agreed on, and should have passed through the seven hundred feet of clear water between the Chinook and the Astoria docks, passing the Thode Fagelund on his port side. In other words, that after he saw that the Thode Fagelund was not carrying out the starboard passage she had asked for, he should have cancelled the agreement and tried to make a port to port passage. This we do not think is fair to Pease. Nolan had asked for the starboard passage and had been given it, and Pease had every right to expect that he would carry it out; if Pease had cancelled the agreement and tried to make a port passage and disaster had resulted, nobody would have been to blame but Pease. This theory of proctor's as to what Pease should have done suggests the following language from the opinion in the "George L. Garlick," 91 Fed. 920, 926:

"After a marine accident, the offending navigators are quite ready with the accusation, against the unoffending ship, that their mistake or fault was appreciable and that the opposite ship should have guarded against it by departing from the prescribed rule of navigation. When one vessel has dictated the maneuver, and the other vessel has adopted and done her part to execute it, the facts should be clear, before the court should hold that the maneuver should have been interrupted, in the course of its fulfillment, because the vessel that initiated the movement failed to do her part. When a vessel is doing right, it is not always easy to determine nicely when the opposite vessel is doing

wrong and whether she will in time correct her error, and at just what time the unoffending vessel should undertake to counteract the wrong.”

The testimony of Mr. Eggars, the chief officer of the Thielbek, is quoted at some length in Wilhelmsen’s brief to show the positions of the vessels at first sight. Eggars drew a diagram showing these positions which has not been incorporated in the printed record, and, believing that that diagram might be helpful to your Honors in connection with his testimony, we have, in accordance with Rule 14 of the rules of this court, procured an order from the District Court, that the original diagram be sent up to this court for your Honor’s inspection.

THE THODE FAGELUND’S FAULT BEING OBVIOUS, THE EVIDENCE TO ESTABLISH FAULT ON THE PART OF THE OCKLAHAMA MUST BE CLEAR AND CONVINCING.

The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211.

The Ludwig Holberg, 157 U. S. 60, 71, 15 Sup. Ct. 477.

The Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610.

The Victory, 18 Sup. Ct. Rep. 149, 155.

THE THIELBEK DID NOT PARTICI-
PATE IN THE NAVIGATION AND HOW-
EVER THIS CASE GOES, CANNOT BE HELD
IN FAULT.

Indeed any attempt to hold the Thielbek at fault
has, we believe, been abandoned. The cases settling her
immunity are:

Sturgis vs. Boyer, 24 Howard, 110.

The Eugene F. Moran, 29 Sup. Ct. Rep. 339.

The John Fraser, 21 Howard, 184.

The Doris Eckhof, 50 Fed. 134.

Spencer on Marine Collisions, Sec. 122.

Respectfully submitted,

ERSKINE WOOD,

Proctor for Knohr & Burchard, Nfl.

IN THE
United States Circuit Court
of Appeals for the
Ninth Circuit

WILHELM WILHELMSSEN,
Libelant and Appellee,

vs.

THE BARK "THIELBEK,"
Knohr & Burchard, Nfl.,
Claimants and Appellees,

THE PORT OF PORTLAND,
Respondent and Appellant.

KNOHR & BURCHARD, Nfl.,
Libelant and Appellee,

vs.

THE "THODE FAGELUND,"
Wilhelm Wilhelmsen,
Claimant and Appellant,

THE PORT OF PORTLAND,
Respondent and Appellant.

No. 2769

Petition for Rehearing

WILLIAM C. BRISTOL
For Petitioner



IN THE
**United States Circuit Court
of Appeals for the
Ninth Circuit**

WILHELM WILHELMSSEN,
Libelant and Appellee,

vs.

THE BARK "THIELBEK,"
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THE "THODE FAGELUND,"
Wilhelm Wilhelmsen,
Claimant and Appellant,

THE PORT OF PORTLAND,
Respondent and Appellant.

No. 2769

Said causes being numbered 6116 and 6111 in the Court below.

Petition for Rehearing

TO THE HONORABLE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH CIR-
CUIT:

Wilhelm Wilhelmsen feeling himself aggrieved
herein by the decision, judgment and opinion of

this Court given and rendered on Monday, the 5th day of March, 1917, respectfully presents this his petition for rehearing and for cause and ground thereof doth respectfully show and present:—

First:

The appellant submitted to this Court the record fact that on October 25, 1915, on the application of the proctor for The Port of Portland, the Court below consolidated all of the causes for the purpose of appeal (see record Vol. 1, p. 283, main brief pp. 98 and 99, main brief p. 101, record Vol. 1, pp. 270 to 272) and therefore the supplemental assignments of error were filed charging that the Court below erred in giving a judgment in favor of Knohr & Burchard, Nfl., for any amount in costs after the Court had originally entered a decree in favor of the "Thielbek" and its owners.

While it is true that Wilhelmsen took no appeal from the decree of October 25, 1915, the appeals taken under the orders of the Court below brought all of the causes, save the libels of the cargo owners, before this Court.

The specific point is not decided by the Court in its opinion, namely, *whether the Court below lawfully exercised the power which it undertook to exercise, after it had passed its order on October 25, 1915, consolidating these causes on appeal, to proceed in 1916, long after it had lost control*

of the previous matters, and then undertake to determine questions of costs and deny the recovery of the same to one party and allow them to the other on a different ground than was stated by it in its decree of June 24, 1915, from which both this petitioner and The Port of Portland appealed.

It will be noted that in the decree of June 24, 1915, which this Court has affirmed with the modification, there was allowed as costs \$239.49.

In the decree entered on the 31st of January, 1916, on the identical matters that had previously been adjudicated June 24, 1915, involving the same collision, the Court in dismissing Wilhelmsen's libel against the "Thielbek" allows costs and disbursements in the amount of \$2247.93.

The question presented was whether the Court had power to do this under the then state of the record.

It is respectfully submitted that the opinion rendered on the 5th of March, 1917, does not dispose of this point, but on the contrary seems to proceed upon the theory that because no appeal was taken the situation thus presented is not open to question. *This point was argued and submitted on pages 168 to 171 of the main brief.*

Second:

The specific point was submitted to the Appellate Court under the specifications of error and the evidence that at a point a thousand feet before the "Thode Fagelund" turned on her course Pease, the pilot of the "Ocklahama," admitted there was plenty of room for him to turn, but nevertheless he kept on and ran with such force into the "Thode Fagelund" that the bow of the "Thielbek" cut into her 26 x 19 feet and the tug "Ocklahama" parted every one of her hawsers and run up about amidships of the "Thode Gagelund" on the starboard side between the dredge and the ship; and it was submitted to the Appellate Court that under its own ruling in the cases of

· "*Bailey Gatzert*," 179 Fed. 47;

"*Santa Maria*," 227 Fed. 149;

"*Manzanita*," 176 Fed. 871.

In the first of these cases this Court held that speed was demonstrated by the impact and effect of the blow and in the last case the officers of the "Manzanita" were held responsible and damages were divided because this Court said from the evidence that there was room to turn and avoid the collision, although the dredge and tow were themselves originally in fault.

But the Court in its opinion of March 5th says: "We agree with the Court below that the evi-

dence fails to show that at any of the times in question the tug with her tow was guilty of excessive speed or that it discloses any negligence on the part of either of those vessels."

It seems clear that this Court overlooked the rule which it has always adhered to and which was announced plainly in the "*Albert Dumois*," 177 U. S. at p. 252, 44 L. Ed. 751, where Mr. Justice Brown, writing for the Court, said:—

"This court has repeatedly held the fault, and even the gross fault, of one vessel does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require."

The presiding Judge of this Court on October 23, 1916, wrote in the case of the "*Virginian*," 238 Fed. 156, the opinion for this Court and applied this rule in a collision case.

This matter was all presented in the main brief at pages 104 to 107.

It is conceived that the Court for some reason overlooked the application of this rule to this case.

Third:

The point was submitted to the Appellate Court on the appeal that the lower Court having found The Port of Portland the primary *tortfeasor* through the negligence of its pilots (and that decision now having been affirmed by this

Court), upon the same state of facts in all of the cases and then consolidated them on the 25th of October, 1915, it was not within the Court's discretion below to separately adjudicate the different liabilities of the parties and give relief over against Wilhelm Wilhelmsen alone.

In other words, the trouble with the decree passed on the 24th of June, 1915, from the standpoint of the legal result now accomplished is that it penalizes Wilhelmsen and his stipulators in costs and interest and damages which both the lower and upper Court say were caused by The Port of Portland; but in the "Thielbek" case the result is to force Wilhelmsen to pay first and before The Port of Portland is required to pay anything, and in his own case he is required to pay \$2247.93 and is denied recovering these costs from The Port of Portland as the matter now stands.

(See Main Brief, p. 170.)

It is submitted that what this Court meant to do in the affirmance of these matters, if that is what was intended, was to so do equity according to the admiralty and maritime procedure that if no correction in the foregoing points can be had, at least Wilhelmsen should have only to pay in the event that The Port of Portland did not pay, and that if he pays the "Thielbek" costs as decreed in his own case, that he certainly should be allowed to have those costs against The Port of Portland.

This was clearly put to the Appellate Court by alleging and showing abuse of discretion in the Court below, particularly for the reason that it was after the Court had lost control of the case that it undertook to pass such a decree.

(*See Main Brief p. 171.*)

WHEREFORE, your petitioner doth say that he is especially aggrieved by the judgment, order and decision of March 5, 1917, in the particulars aforesaid wherein the matters of consideration herein referred to were apparently not disposed of as to the admiralty and maritime jurisdiction doth appertain, and so it is that your petitioner prays a reconsideration that full and complete justice may be done if it be that this Court should see fit to consider for the reasons given and grant a rehearing or in lieu thereof modify to further extent before the mandate comes down the rulings and opinion hereinbefore made, your petitioner will ever pray.

WILHEIM WILHELMSEN,
Of Tunsberg, Norway,
Appellant Petitioner.

WILLIAM C. BRISTOL,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA, }
State and District of Oregon. } ss.

I, the undersigned, do hereby certify that I am counsel for the appellant, petitioner for rehearing in the above entitled cause and Court; that I prepared the foregoing petition for rehearing and that it is not interposed for delay, inconvenience or embarrassment; that in my judgment the grounds and reasons therein stated for the rehearing are well founded.

WILLIAM C. BRISTOL,
Counsel for Petitioner.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILHELM WILHELMSSEN,
Libelant and Appellee,
v.

THE BARK "THIELBEK,"
Knohr & Burchard, Nfl.,
Claimants and Appellees,
THE PORT OF PORTLAND,
Respondent and Appellant.

KNOHR & BURCHARD, Nfl.,
Libelant and Appellee,
v.

THE "THODE FAGELUND,"
Wilhelm Wilhelmsen,
Claimant and Appellant,
THE PORT OF PORTLAND,
Respondent and Appellant.

No. 2769.

**On Appeal from the District Court of the
United States for the District of Oregon**

Petition for Rehearing

WOOD, MONTAGUE & HUNT, and MR. ERSKINE WOOD,
Yeon Building, Portland, Oregon,
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TEAL, MINOR & WINFREE, and MR. ROGERS MAC VEAGH,
Spalding Building, Portland, Oregon,
Proctors for The Port of Portland.

MR. WILLIAM C. BRISTOL,
Wilcox Building, Portland, Oregon,
Proctor for Wilhelm Wilhelmsen.

Filed

APR 30 1911

E. D. Monckton

United States Circuit Court of Appeals

For the Ninth Circuit

WILHELM WILHELMSSEN,	}	No. 2769.
<i>Libelant and Appellee,</i>		
<i>v.</i>		
THE BARK "THIELBEK,"		
Knohr & Burchard, Nfl.,		
<i>Claimants and Appellees,</i>		
THE PORT OF PORTLAND,		
<i>Respondent and Appellant.</i>		
<hr/>		
KNOHR & BURCHARD, Nfl.,		
<i>Libelant and Appellee,</i>		
<i>v.</i>		
THE "THODE FAGELUND,"		
Wilhelm Wilhelmsen,		
<i>Claimant and Appellant,</i>		
THE PORT OF PORTLAND,		
<i>Respondent and Appellant.</i>		

On Appeal from the District Court of the United States
for the District of Oregon

Petition for Rehearing

In the brief on behalf of the appellant, The Port of Portland and in the oral argument appellant sought a reversal of the decrees of the District Court in these causes upon several grounds:

I.

The appellant claimed that the cause of the collision was a mistake in judgment on the part of Nolan, the pilot on the "Thode Fagelund," and not negligence.

II.

The appellant claimed that the amendment to its charter by a vote of the people of The Port of Portland submitted by the initiative and adopted by the voters was void and that on this account The Port of Portland had no power to engage in the business of pilotage or in the business of towage and having no power it could not employ a pilot, and therefore was not bound by the acts of negligence on the part of the pilot Nolan.

III.

The Port of Portland claimed that its liability to the "Thode Fagelund" and its owners is limited by the act under which this service was performed, and that no sum can be recovered against it for the negligence of pilot Nolan either by the "Thode Fagelund" or by its owners in excess of the statutory limitation, \$10,000.00.

IV.

The Port of Portland claimed that the Workman case, upon the authority of which rests the opinion rendered in this court, is not applicable.

The first question is decided against the appellant in no uncertain terms in the opinion of this court.

The second contention on behalf of this appellant is indirectly if not directly passed upon by this court. The third proposition for which this appellant contended is mentioned in the statement of the case by your Honors, but at no other place in the opinion is it referred to. The fourth contention of the appellant is decided adversely by your Honors.

The case is of such great importance to the appellant and of such interest to the public at large that the appellant feels constrained to ask your Honors to reconsider this matter and to pass directly and positively upon the proposition numbered III *supra*, and to reconsider in connection therewith the Workman case, to the end that this appellant may know not only what its liability is but also the extent of its liability and the principles on which this liability is predicated and may intelligently adjust its business to accord with your Honors' decision.

LAWS REGULATING PILOTAGE

At the time this accident occurred the State of Oregon had a general law regulating shipping and navigation, including pilotage. This act is contained in Title XXXVIII, Chapter 4, Volume II, L. O. L., pages 1936 and following. The first division

of this act regulates pilotage on the Columbia River bar and on the Columbia and Willamette Rivers. The other subdivisions have no bearing upon the matters before your Honors. Under this act pilot commissioners for the bar and river pilot grounds are appointed by the Governor, and such commissioners are given very ample powers, and they are also required to discharge many and in some respects complex duties. Among other duties they are to discharge is that of licensing pilots for the bar service and pilots for the river service. They have power to hear and determine all complaints against any of said pilots, to make and alter rules for the government of such pilots and for the maintenance of an efficient pilot service on the pilot grounds, and to enforce the same by any lawful and convenient means, including suspension or removal of any pilot. They also must keep a registry of each vessel crossing the Columbia River bar and they are placed in charge of a pilot schooner belonging to the State, and are required to provide pilots with an adequate vessel on which to ply their vocation as bar pilots. *The duties and rights of pilots are also prescribed by this act and the liability of a pilot for his negligence or incompetence is also expressly declared.* Section 5179 of this act authorizes a licensed pilot to take charge of any sea-going vessel over 100 tons of burden, not then in charge of a pilot, anywhere upon the pilot grounds for which he is licensed, and to navigate her upon and over the same, and demand and receive therefor the compensation allowed by

law. Section 5180 fixes the compensation for the pilot service on the bar. Section 5185 makes the master, owner and consignee or agent of the vessel liable to the pilot jointly and severally for any sum due him for piloting or *offering to pilot* such vessel. Nothing is said positively in the act in regard to whether the pilotage law is or is not compulsory in its nature, but Section 5181 of the same act, which provides for compensation for river service, also provides that it shall be optional with the master or person in charge of any vessel whether he accepts or demands the service of any river pilot, thus declaring that river pilot service shall not be compulsory, and by implication it would seem that the act contemplates that bar pilot service shall be compulsory.

This law was in full force and effect in 1908 when the charter of The Port of Portland was amended by initiative petition and the vote of the legal voters of the said corporation. At the following session of the legislature in 1909 a general law was enacted by the legislature authorizing the incorporation of municipal corporations, designated as ports, in counties bordering upon bays or rivers navigable from the sea or containing bays or rivers navigable from the sea. Under this act, III L. O. L., Section 6121, subdivision 5, such corporations are given power to establish, maintain, and operate a tug boat and pilotage service, to operate steam tug boats and steam and sail pilot boats, to collect charges for vessels employing such tugs so

operated and to collect charges for pilotage services rendered by *employees of the corporation*. This act indeed grants generally the powers granted by the initiative act under which the powers of The Port of Portland were enlarged at the election of 1908, and, indeed, contemplates that The Port of Portland may reincorporate under the provisions of this act. It will be noted that under the general law regulating pilotage the State fixes the compensation for piloting a vessel. The State declares the powers and authority of the bar pilot, gives him a right to sue for compensation for his services, whether he pilots the vessel or offers to pilot the same, and the general law makes the pilot liable for any loss or injury due to his negligence or incompetency; it also requires of him a bond and makes the sureties upon his bond liable to the extent of the bond for loss or injury by reason of his negligence or incompetency. Under the law of 1909 above referred to there is no provision for licensing pilots, for regulating pilots or for removing pilots. Under the initiative act of 1908 the powers of The Port of Portland are enlarged. No power is given The Port of Portland to license pilots, to regulate pilots, to control pilots, or to discharge pilots, and under neither of these acts are the duties of pilots prescribed. *These matters were left to the general law in force at the time that the charter of The Port of Portland was amended.* In addition to pilots licensed by State authority there were at such time also pilots licensed by authority

of the United States and possibly pilots on the Columbia River licensed by authority of the State of Washington, but as Nolan was not a licensee of either the United States or the State of Washington it is unnecessary to consider any laws except those of the State of Oregon and of The Port of Portland. The purpose of the general law above referred to, though it is not stated in the act, is to establish and maintain an efficient pilotage service on the Columbia bar and on the Columbia and Willamette Rivers. The purpose of the initiative act amending the charter of The Port of Portland is clearly to enable The Port to establish and maintain an efficient towage and pilotage service between its corporate limits and the open sea, including the Columbia River bar. All these acts therefore are designed for one purpose, and none of the acts undertakes to repeal any provision in any of the other acts. The pilotage law, therefore, Title XXXVIII, Chapter 4, II L. O. L., is now and was at the time this accident occurred in full force and effect, and the rights and duties and liabilities of pilots are now and were at that time fixed and determined by the general law and not by the initiative act of The Port of Portland or by the general act establishing ports, for in neither of these acts is anything said in regard to the rights, powers, or liabilities of pilots, or in regard to the licensing, regulation, control, discharge, or suspension of pilots.

The Port of Portland therefore could not act as

a pilot. If it employed a pilot it could discharge him from its service but could not take away his powers as pilot. These were granted by the State and could be taken away only by State authority. That The Port of Portland was not employed to pilot a vessel is shown by the act itself, for the act provides (Section 6106) that The Port may operate steam and sail pilot boats and steam tug boats and collect charges for vessels employing the tugs operated, and also *collect charges for pilotage services rendered by employees of The Port*; and Section 6108 provides that if the vessel be injured by reason of the fault of the tug it may recover damages, or if it be injured by reason of the negligence or incompetency of the pilot it may recover damages, but in no case shall The Port be liable for more than \$10,000.00 of the loss or injury. In fine, the law clearly contemplates that when the pilot goes upon the vessel he takes charge of the vessel under the power conferred on him by the statute (Section 5179); his powers and authority are defined by this statute; and with such powers and with such authority The Port of Portland cannot interfere.

The proper construction, therefore, to be placed upon the initiative act is, so far as pilotage is concerned, that The Port of Portland, in order to establish and maintain an efficient pilotage service between its boundaries and the open seas, should operate steam or sail pilot boats upon the Columbia bar pilotage grounds in the same manner as under Section 5175 the Board of Pilot Commis-

sioners were enjoined to provide the pilots with an adequate vessel in which to ply their vocation as bar pilots, and, to still further make efficient such pilotage service, The Port should keep in its employment a sufficient number of licensed pilots, to the end that any vessel desiring to trade within the boundaries of The Port might have efficient pilotage service at all times.

Seemingly at the time this act was passed the towage service upon the river was unsatisfactory. The pilotage service upon the river and upon the bar were likewise unsatisfactory. The compensation which pilots would earn was precarious, depending entirely upon the number of vessels which they might be employed to pilot and from which they might receive compensation. Therefore The Port, to meet these conditions, to apply a remedy which would accomplish the end desired, was authorized to employ these pilots. The effect of this employment is that the pilots have steady employment and remuneration, and that the constant remuneration which they receive from The Port is such that a sufficient number of persons are thereby induced to qualify themselves to act as pilots and to discharge the duties of pilots. In return for this steady employment and steady remuneration under the authority of the law, the pilot, by accepting employment from The Port of Portland, gives to The Port of Portland his right to the statutory fees to which he would be entitled for his services rendered vessels piloted by him. The law recognizes

this contract and enables The Port to enforce in its own name the collection of these fees, and enables The Port to contract, if it so desires, that the pilot will pilot the vessel for a less compensation than that fixed by law, thereby benefiting pilot, ship, and the community, and effecting the object desired. The result is that the vessel employs, not The Port of Portland but employs the pilot, who when on the vessel is in charge and is exercising the authority and performing the duties prescribed by the general law. The vessel agrees upon the compensation to pay, not with the pilot but with The Port, and pays the compensation to The Port.

The Port does not claim that there is any decision directly in point on this proposition but does claim that the rights of the parties should be determined by analogy and enforced according to the real contract between the parties based upon the statutory provisions of the State. Furthermore, the vessel gains, for it retains all its rights against the pilot, that is to say unlimited liability on the part of the pilot, and it has the recommendation of the City as to the competency and character of the pilot as well as the recommendation of the Board of Pilot Commissioners, and it has in addition thereto a guaranty on the part of The Port of the competency and fitness of the pilot, limited, however, so far as the guaranty is concerned to the sum of \$10,000.00.

It is a general principle universally recognized by the courts that public officers are not liable for the negligence of subordinate officers or agents

whom they are bound by law to employ, in the absence of negligence or other wrong on their own part, and Mr. Thompson in his work on negligence, Section 6378, says in such cases the doctrine of *respondet superior* does not apply but such subordinate officers or agents are deemed independent officers of the law and answerable to the public for the proper discharge of the duties of their offices or agencies, and liable to the State in criminal or other lawful proceedings for nonfeasance in that behalf, and also answerable to individuals for misfeasances whereby such individuals are specially damaged.

A case somewhat analogous to the case at bar is found in *Guy v. Donald*, 203 U. S. 399. There the pilotage law of the State of Virginia was under the consideration of the Supreme Court. From the extracts contained in the opinion it will be seen that the pilotage law of the State of Virginia is very similar to that of Oregon. There was a voluntary association of pilots known as the Virginia Pilotage Association. This Association was recognized by the pilotage law of the State and also by the rules of the Board of Pilot Commissioners. This Association made contracts with ships for pilotage. The fees earned were paid to the Association upon bills made out by the Association and went into a common fund from which the Association paid the expenses of the business, including office rent, and divided the net profits among the pilots according to the number of days the several pilots were upon

the active list. The owner of a steamer sued the Virginia Pilot Association for the negligence of Guy, one of their number. The Supreme Court held that the members of the Association were not liable. The principle upon which the case turned is that inasmuch as the Association could not control the act of the party who was guilty of negligence, its members could not be held for the negligence. The court says :

“It is quite plain that the Virginia code contemplates a bond of mutual personal liability between the master of a vessel and the pilot on board. If we imagine such a pilot performing his duties within sight of the assembled Association he still would be sole master of his course if all of his fellows passed a vote on the spot that he should change and shouted it through a speaking trumpet he would owe no duty to obey but would be as free as before to do what he thought best.”

These principles are equally applicable to the case at bar. If pilot Nolan had been performing his duties in sight of the Commissioners of The Port, if indeed these commissioners had been on board the ship, if they at that time had unanimously declared that he should change his course and so instructed him, if they threatened to discharge him and actually were to undertake to discharge him while he was in charge of the vessel, he would owe no duty to them to obey. He would be as free as

before to do what he thought best, and it be his duty to do what he thought best, for he would be discharging the duties imposed upon him by the general laws of Oregon under which he was licensed and authorized to act, and The Port had no power to control such action.

The principle upon which the employer is held liable for the negligence of the employee is that the employee is discharging the duties which the employer has undertaken to discharge and that the employer has entrusted a part of this work to another, but the law does not recognize that The Port of Portland could undertake these duties. It does recognize that a qualified employee of The Port could undertake to and perform these duties if licensed by the State. Therefore in discharging his duties *the employee is not discharging the duties of or doing the work of the employer but is doing his own work entrusted to him by statute, work which the employer could not do and which it is not authorized by law to do.*

THE WORKMAN CASE.

In your Honors' opinion, page 9, it is said that this cause is controlled by the *Workman* case. In the *Workman* case a bark was moored to a dock and while so moored was struck and injured by the steam fire-boat "New Yorker," owned by the City of New York. The fire-boat had been called to aid in extinguishing a fire in a warehouse. The owner of the bark sued the City of New York, the

fire department of the city and the person in charge of the navigation of the fire-boat at the time of the collision. The owner of the bark therefore occupies the same position as the owners of the "Thielbek" and the "Ocklahama," not the position at all of the owners of the "Thode Fagelund." The Supreme Court held that as the bark was injured through no fault of its own, as the fire-boat was in discharge of its duties and was owned by the City, the City was liable for the damages sustained. Seemingly the libel was dismissed as to the fire department, and this part of the judgment and decree of the District Court was seemingly not affected by the appeal.

In the *Workman* case the bark occupies toward the fire-boat the same position which the "Thielbek" and "Ocklahama" in the case at bar occupy toward the "Thode Fagelund." The injury did not result from any negligence or wrong on the part of the bark in the one case nor from any negligence or wrong on the part of the "Thielbek" and the "Ocklahama" in the case at bar, and it may therefore be conceded that if The Port of Portland is liable for more than \$10,000.00 it is liable to the "Thielbek" in this sum, but as the "Thode Fagelund" does not occupy the same position toward The Port which the bark occupied to the fire-boat in the *Workman* case, it would seem that the *Workman* case should not be considered as decisive of the case at bar. In this connection your Honors' attention is directed again to the law of the State of Oregon

under which The Port of Portland is organized, and in connection therewith your Honors' attention is called to the decision of the Supreme Court in the *Oregon Railway & Navigation Co. v. The Oregonian Railway Co.*, 130 U. S. 1, wherein the Supreme Court lays down broadly the principle that the powers of corporations are such and such only as are conferred on them by the acts of the legislature of the several states under which they are organized, and that all parties contracting with such corporations must recognize this limitation upon the powers of the parties with whom they contract. Here The Port of Portland was not engaged in piloting the "Thode Fagelund"; it could not legally pilot this vessel and had no power to undertake this duty for the law of its incorporation gave it no such power. In the *Workman* case the court holds that in admiralty the vessel is the active agent. It therefore is held liable *in rem* for injuries sustained through its fault, though of course the fault of the vessel is really due to the negligence of those who have charge of her. Admiralty, however, personifies the vessel as it were, makes the vessel liable for the damage done and the owners of the vessel and those having charge of her navigation liable as it were indirectly, that is to say, liable for the damage done by the vessel. Upon this principle the court in the *Workman* case held that the fire-boat of the City was guilty of negligence, and that the owner of the fire-boat and those having charge of her navigation were, because

of their relation to the fire-boat, responsible for the negligence of the fire-boat. In other words, that the negligence of the fire-boat should be imputed to the owner and those in charge of her navigation. Public policy forbade the court from condemning the fire-boat, but such public policy did not extend to the owner or to the party in charge of her navigation, and therefore a recovery was had against the owner and against those in charge of the navigation of the fire-boat. In the case at bar, however, the "Thielbek" was not found to be guilty; the "Ocklahama" was not found to be guilty and those in charge of the "Thielbek" and those in charge of the "Ocklahama" were found to be guiltless. No negligence, therefore, having been found against the "Ocklahama" or against the "Thielbek" no negligence can be imputed to The Port of Portland by reason of its ownership of the tow-boat. The negligence found by your Honors is the negligence of Nolan as a pilot discharging his duties as a pilot under the laws of the State of Oregon, not the negligence of the City in employing him, for the uncontradicted evidence offered on behalf of the "Thode Fagelund" is that Nolan was licensed by State authority; that he was a pilot of experience and standing and of good reputation for care, so much so that it was shown that, when discharged by The Port of Portland, he was employed by the United States as pilot of the dredge "Chinook." The Port therefore is not charged with a failure to exercise due care in recommending Nolan or in employing Nolan for

the "Thode Fagelund," and The Port submits that it discharged its full duty toward the "Thode Fagelund" in this particular.

THE LIMITATION.

Formerly it was held that a ship owner was an insurer and that the owner was responsible for loss or damage however arising, but responsible only to those with whom he contracted for the carriage of goods or to those injured by his actual carelessness in the navigation of his ship. The law in this particular has been much modified. A ship owner may now limit his liability either under the English or the American law. Such limitation may be effected by contract.

Maclachlan in his *Law of Merchant Shipping*, Fifth Edition, page 603, says:

"It is now, however, quite usual for ship-owners to stipulate that they shall not be liable for losses by the excepted perils even when due to their negligence or that of their servants, or directly to except loss by such negligence, and there is no rule of English law which prevents due effect being given to these stipulations," citing *Steel v. State Line*, 3 App. Cas. 72, 88.

And again on page 613 the author says:

"We have seen that the exceptions in the contract do not protect the shipowner against claims for loss or damage due to the excepted

causes, when brought about by the negligence of himself or his servants; but that he may protect himself against the operation of this rule by stipulating, expressly and unambiguously, that he will not be responsible for such negligence. Clauses having that object are now common, but they vary greatly in their language."

In the foot note it is said, page 613:

"Exemptions from liability for loss 'from any cause,' or under 'any circumstances whatever,' or similar clauses, have been held to exempt railway companies, carriers of passengers' luggage by sea and the grantors of free passes from responsibility for the negligence of servants," citing *McManus v. L. & Y. Ry. Co.*, 4 H. & N. 327; *Ashendon v. L. & B. Ry. Co.*, 5 Ex. D. 190; *Taubman v. Pacific Steam Nav. Co.*, 26 L. T. 704; *The Stella*, P. 161.

The same author, page 614, says:

"Sometimes, as where the Harter Act is incorporated in the contract, the shipowner is exempted from liability for damage or loss resulting from faults or errors in navigation or in the management of the vessel,"

and on the same page a distinction is drawn between the negligence of a servant on board the ship which was not carrying the cargo injured and that of a servant on board the ship which was carrying

the cargo damaged, holding the ship owner liable in the one case and not in the other, though the contract of carriage contained an exception of the negligence of servants, and in *Westport Coal Co. v. McPhail*, 2 Q. B. 130, cited by the author on page 615 it is said that where the master of the ship was also a part owner, and a bill of lading excepted the negligence and default of master in navigating the ship and the cargo was lost by the stranding of the ship through his negligence, as the negligence was entirely in his (master's) sphere of duty as master he was protected as owner by the exemption.

Many statutes have been enacted by Congress whereby owners of ships may limit their liability. Note the limitations found in Sections 4281, 4282 and 4283 Revised Statutes; Section 4287 preserves the remedy, however, over and against master, officers or seamen though the owner's liability is limited.

By the act of February 13, 1893, commonly known as the Harter Act, Section 3, if the owner of a vessel transporting merchandise shall exercise due diligence to make the vessel in all respects seaworthy, properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterer shall become or be responsible for damage or loss resulting from faults or error in navigation or in the management of said vessel and so forth. Owners of vessels also may limit their liability by surrendering their vessel when the damage or loss was occasioned through her fault, provided that the

owner himself is not guilty of any personal negligence. In ordinary business transactions persons may limit their liability by contract. The limitations above mentioned under the Revised Statutes are given by statute, and it is not necessary that such limitation be inserted in the contract.

The Port of Portland contends that it had a contract with the "Thode Fagelund" and its owners whereby it was agreed that it should supply a licensed pilot to pilot the "Thode Fagelund" over the bar pilotage grounds; that such pilot should be a man of good character and standing and competent to discharge the duties, and that the ship should pay for the services rendered by such pilot a certain sum agreed upon and fixed by the pilotage rates or charges theretofore established and made public in pursuance of law; that this pilot should be one of its employees and that it would answer for his negligence if he should be guilty of negligence, to the extent of \$10,000.00 and no more. The Port contends that this contract was one which it had a right to make, one which the law under which it was acting required it to make, and that the *limitation was an integral part of the contract*. The law under which The Port of Portland was acting was a public law. The rates or charges for pilotage which it would demand were published. Of these public acts the owners of the "Thode Fagelund" are charged with full notice and The Port contends that the "Thode Fagelund" and its owners are bound by this contract. It contends that the con-

tract is not in violation of any rule of admiralty. The contract takes from the ship and from its owners no right or remedy which it or they would have under the admiralty law. The ship and its owners reserve the remedy against the pilot for his negligence. It claims that its liability to the extent of \$10,000.00 is in the nature of a guaranty, on its part, that the pilot was competent and would discharge his duties, but it claims also that no rule of admiralty makes it answerable for negligence on the part of the pilot discharging the duties imposed upon him by the statute law of the State and by the rules of admiralty. The *Workman* case, resting upon the principle that the offending vessel is liable under the rules of admiralty for any injuries sustained by the innocent vessel and that negligence on its part may be imputed to its owners, can have no application to a case of this character in so far as the "Thode Fagelund" is concerned.

In conclusion, we as proctors for The Port of Portland would not have your Honors think that we do not recognize that one decision of the Supreme Court of the United States on any question, so long as it stands unreversed, is binding upon inferior courts. The *Workman* case is binding upon your Honors where the facts involved are the same or similar to those involved in that case, or where the principle upon which the liability is predicated is the same. So close, however, was that case regarded by the Supreme Court that the court was almost equally divided in regard to the responsibility of

the City of New York, but the case, we admit, is an authority for what it decides upon the facts presented therein. We respectfully submit, however, that it is not authority upon the facts presented upon the record in these causes.

Respectfully submitted,

TEAL, MINOR & WINFREE,
ROGERS MAC VEAGH,

*Proctors for Petitioner,
The Port of Portland.*

I, WITT VINON, do hereby certify that I am one of the proctors for the Port of Portland, respondent and appellant in the above entitled cause and petitioner for re-hearing therein; that I prepared the within and foregoing petition and in my judgment the same is well-founded; and that said petition is not interposed for delay.

WITT VINON

United States
Circuit Court of Appeals
For the Ninth Circuit.

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS, TO BE ISSUED AND DIRECTED TO
THE HONORABLE WILLIAM C. VAN FLEET,
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA, SECOND DIVISION.

PETITION FOR WRIT OF MANDAMUS.

Filed

1906 - 1906

F. D. Moulton

United States
Circuit Court of Appeals
For the Ninth Circuit.

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
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THE HONORABLE WILLIAM C. VAN FLEET,
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OF CALIFORNIA, SECOND DIVISION.

PETITION FOR WRIT OF MANDAMUS.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Petition of the **EQUITABLE TRUST COMPANY** of New York, as Trustee, for a Writ of *Mandamus*, to be Issued and Directed to the Honorable **WILLIAM C. VAN FLEET**, Judge of the United States District Court, for the Northern District of California, Second Division.

Petition for Mandamus.

To the Honorable **WILLIAM B. GILBERT**, Presiding Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, and to the Judges of said Court:

The petition of the Equitable Trust Company of New York, a corporation, organized and existing under the laws of the State of New York, respectfully sets forth:

On the 29th day of March, 1916, there was pending in the District Court of the United States, for the Northern District of California, Second Division, a certain action for the foreclosure of the First Mortgage of the Western Pacific Railway Company, and the appointment of receivers for the property of said Railway Company covered by such First Mortgage *pendente lite*, in which the Equitable Trust Company of New York, as Trustee, was plaintiff, and the Western Pacific Railway Company, Boca and Loyalton Railroad Company, Chester L. Hovey, as Receiver of Boca and Loyalton Railroad Company, and Mercantile Trust Company of San Fran-

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cisco, as Trustee, were defendants, and Central Trust Company of New York, as Trustee, was intervening defendant. The jurisdiction of said Court over said cause was invoked solely on the ground of diversity of citizenship.

There was pending in said court at said time and in said action a petition on the part of the Savings Union Bank & Trust Company for leave to intervene in said cause.

Various controversies had arisen in said cause between the Judge of said court and the plaintiff, certain of which said controversies were presented to this Court in certain original proceedings brought therein, and entitled as follows: *Ex parte* Equitable Trust Company of New York, as Trustee of the First Mortgage of the Western Pacific Railway Company, plaintiff in the action of Equitable Trust Company of New York, as Trustee, against the Western Pacific Railway Company; In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of *Mandamus* to be issued and directed to Honorable William C. Van Fleet, Judge of the District Court of the United States, for the Northern District of California, and to said District Court; In the Matter of the Appeal of the Equitable Trust Company from the Order Issuing the Injunction, dated February 21, 1916.

In said proceedings for Prohibition and *Mandamus* John S. Partridge and Garret W. McEnerney appeared as counsel for the said Judge, and on the hearing of the appeal the said Partridge and McEnerney appeared as counsel for the receivers,

theretofore appointed by said Court in said suit of Equitable Trust Company of New York as Trustee against Western Pacific Railway Company and others.

On or about the 14th day of March, 1916, your petitioner was informed that the Judge of the United States District Court, for the Northern District of California, Second Division, to wit, the Honorable William C. Van Fleet, was conducting, and causing to be conducted proceedings in relation to said cause in such manner that it seemed probable that the said Judge entertained a personal bias and prejudice against your petitioner. Immediately upon the receipt of such information by your petitioner, your petitioner sent to San Francisco, Lyman Rhoades, one of the vice-presidents of your petitioner, and instructed the said Lyman Rhoades to investigate the proceedings being conducted in said cause in California, and to ascertain to the best of his ability whether or not said Honorable William C. Van Fleet did in fact entertain a personal bias and prejudice against your petitioner; that said Lyman Rhoades arrived in San Francisco on the 18th day of March, 1916, and proceeded thoroughly to investigate and to ascertain to the best of his ability whether or not the said Honorable William C. Van Fleet entertained a personal bias and prejudice against your petitioner as plaintiff in the said action of the Equitable Trust Company of New York, as Trustee, against the Western Pacific Railway Company. Said Lyman Rhoades, after such investigation, reached the conviction that

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said Judge did entertain a personal bias and prejudice against your petitioner, but, at the time such conviction was reached by said Lyman Rhoades, there was under submission in this court, to wit, the United States Circuit Court of Appeals, for the Ninth Circuit, the petitions for Mandate and Prohibition hereinbefore mentioned. Said Lyman Rhoades then caused to be prepared an affidavit, embodying his conclusion that the said Honorable William C. Van Fleet entertained a personal bias and prejudice against your petitioner, and a personal bias and prejudice in favor of other parties interested in said cause, and stating the reasons for such conclusion, but that said Lyman Rhoades did not desire that said affidavit should be filed until after the question of the propriety of filing the same had been presented to the president and executive committee of the Equitable Trust Company of New York. Counsel for your petitioner were of the opinion and advised your petitioner that it was proper and right that the question of filing said affidavit should be presented both to the Equitable Trust Company of New York and to the Reorganization Committee of the First Mortgage Bondholders of the Western Pacific Railway Company, and were also of the opinion and advised your petitioner that such affidavit should not be filed, unless the filing thereof became unavoidable, until after the decision of this Honorable Court in the matters then pending before it;

On the 20th day of March, 1916, the said Honorable William C. Van Fleet announced that he would

make no orders and take no proceedings in the said action of the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company, until after this Honorable Court determined the matters then pending before it; and forthwith, upon such announcement being made, the said Lyman Rhoades returned from San Francisco to New York, arriving in New York on or about the 26th day of March, 1916. As soon as said Lyman Rhoades arrived in New York he caused to be there prepared an affidavit, stating explicitly the fact that the said Honorable William C. Van Fleet, Judge of the District Court of the United States, for the Northern District of California, Second Division, entertained a personal bias and prejudice against your petitioner, and in favor of other parties interested in said cause, and setting forth and showing the reasons for his belief that such was the fact.

Thereafter, and on the 29th day of March, 1916, said Lyman Rhoades presented such affidavit to the executive committee of said Equitable Trust Company, and requested their instructions as to whether the same should be filed. The first meeting of the executive committee of the Equitable Trust Company of New York which took place after the said return of said Lyman Rhoades from San Francisco to New York was on said 29th day of March, 1916.

Prior to said meeting of said executive committee the Reorganization Committee of the First Mortgage Bondholders of the Western Pacific Railway Company had requested that said Equitable Trust Com-

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pany should file such affidavit in said cause, in the event that said Trust Company should be of the opinion that the said Judge entertained a personal bias and prejudice against said Trust Company, and should be further advised by counsel that the filing of said affidavit was proper and necessary for the protection of the interests of the First Mortgage Bondholders of the Western Pacific Railway Company.

The executive committee of the Equitable Trust Company, being of the opinion that the making and filing of such affidavit was proper and necessary, and that the same constituted one of the duties devolving upon it by virtue of its trust, and being advised by its counsel that the filing of said affidavit was proper and necessary for the protection of the interests of the First Mortgage Bondholders of the Western Pacific Railway Company, duly directed that such affidavit be made and filed; that forthwith the said Lyman Rhoades made said affidavit, and forwarded the same to San Francisco, said affidavit having been made in the city of New York on the 29th day of March, 1916, and before the Equitable Trust Company, or said Lyman Rhoades, had been informed that this Honorable Court had delivered its opinion upon the matters then pending before it; that said affidavit was forthwith mailed to Jared How, San Francisco, counsel for the Equitable Trust Company of New York, and was received by said Jared How in due course of mail, and was, on the first opportunity after the same was received, viz., on Monday, the 3d day of

April, 1916, at forty minutes past nine o'clock A. M., filed in the office of the clerk of the United States District Court for the Northern District of California, Second Division; that at the time of such filing of such affidavit there was presented to said clerk by said Jared How a form for an order in the usual form, directing that the fact of the filing of such affidavit should be entered on the records of the court, and that an authenticated copy thereof should be forthwith certified to the Senior Circuit Judge for said Circuit then present in the Circuit; that said clerk was requested, at the time said affidavit was filed, to take the same forthwith to the said Judge, together with said form for an order; that said Judge, upon said affidavit and form for an order being presented to him by said clerk, refused to receive the same, and directed the clerk to return the same to counsel for your petitioner, and to state to him that proceedings would have to be taken in open court, and the affidavit there presented.

Accordingly and in compliance with the requirements of said Judge, counsel for your petitioner, at the hour of ten o'clock A. M., of said 3d day of April, 1916, presented said affidavit to said Judge in open court, together with said form for an order; that the said Judge requested that said affidavit be read by counsel for the petitioner, and said affidavit was in open court presented to and read to said Judge by counsel for your petitioner; that counsel for your petitioner thereupon moved and requested the Court to make an order that an authenticated copy of the said affidavit should be

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forthwith certified to the Senior Circuit Judge of said Circuit then present in the Circuit, in accordance with the provisions of sections 20 and 21 of the Federal Judicial Code. The affidavit hereinbefore referred to, together with a copy of the form for an order presented at the time the same was filed, is hereunto annexed, marked Exhibit I, and made a part hereof. A full transcript of the proceedings had at the time of the reading of said affidavit is hereto attached, marked Exhibit II, and made a part hereof.

That, as appears in said transcript of proceedings, said Court refused at said time to make such order, and continued the matter until Wednesday, the 5th day of April, 1916.

On the 5th day of April, 1916, the said Judge declared that he desired the advice of counsel concerning his duty in the premises, and stated that he had requested Garret W. McEnerney and John S. Partridge to advise him concerning his duty in the premises, as his counsel. A full transcript of the proceedings taking place on said 5th day of April, 1916, is hereto attached, marked Exhibit III, and made a part hereof. That at the request of said counsel for the Judge, and over the protest and objection of counsel for your petitioner, said Judge postponed until Friday, the 7th day of April, 1916, at the hour of two o'clock P. M., any determination upon the subject.

Thereafter, on Friday, the 7th day of April, 1916, at the hour of two o'clock P. M., said Judge filed in the above-entitled cause an affidavit, a copy of

which is hereto attached, marked Exhibit IV, and made a part hereof. To the filing or consideration by said Judge of said affidavit your petitioner objected, and excepted to the ruling of said Judge permitting the same to be filed.

On the same day John S. Partridge, one of counsel for said Judge, filed in said cause an affidavit, a copy of which is hereto attached, marked Exhibit V, and made a part hereof. To the filing or consideration by said Judge of such affidavit counsel for your petitioner duly objected, and to the ruling allowing the same to be filed your petitioner excepted.

In the affidavit filed by said Judge it was declared: "That it is the intent of the affiant to proceed forthwith, and with all possible expedition, to the hearing of any further matters that may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale, and winding up of the receivership; that affiant is satisfied in the state of his own mind that affiant in all matters and things in connection with said action can and will, and intends to do equal and exact justice to all parties who may be interested therein."

After the filing and reading of said affidavit containing said statement, the said Honorable William C. Van Fleet proceeded to entertain advice from Garret W. McEnerney and John S. Partridge, his counsel, regarding his duty in the premises, which advice took the form of arguments upon the merits of the affidavit of Lyman Rhoades above referred to. Garret W. McEnerney, at the conclusion of his said

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argument, which said argument was delivered by him as counsel for said Judge, and as advisor of said Judge, stated and declared as follows:

“Now, he has also spoken about this affidavit. Mr. How’s theory on the 6th of March, and Mr. Rhoades’ theory on the 29th of March, are a little different, and he has referred to it now, and quoted from memory what Mr. Rhoades did say, but I have it here. In paragraph 7 Mr. Rhoades says: ‘It is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible up-set price for the mortgage property.’ That doesn’t mean simply minority bondholders who have come to court, but all minority bondholders who haven’t gone into the reorganization. Now, then, if it is to the manifest interest of the minority bondholders to get a high up-set price, what is the interest of the majority bondholders? The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price—so the minority wants the highest up-set price, and the majority wants the lowest up-set price. Now what does the Trustee want? ‘The duty of the Trustee is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered, no more and no less, and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders.’ Now, let us see if we under-

stand this position. The minority bondholders want the highest up-set price; the majority bondholders want the lowest up-set price; the Trustee wants to compel the majority bondholders to pay the true value of the property, all elements of value and all qualifying factors being considered, no more nor no less. So we have three groups of persons present at the fixing of the up-set price—the minority bondholders wanting it low—the majority bondholders wanting it high; the Trustee, over in the corner, wanting to compel the majority bondholders to pay the full and true value of the property. Now, who are the majority bondholders? They are the Reorganization Committee, and it is so stated in paragraph 5 of Mr. Rhoades' affidavit (quoting from the affidavit): 'It is, and at all times has been the desire of the said bondholders that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interest of such of the bondholders as may join in the plan of the reorganization.' So that, after all, the minority bondholders want a high price—the Reorganization Committee, on the other side, wants the lowest possible price, and the Trustee, over in the corner, wants to compel the Reorganization Committee to pay the true value of the property at the time of sale, all elements of value and all qualifying factors being considered. And who represents the Trust Company? Alvin W. Krech is the president of the Equitable Trust Company, and Lyman Rhoades is the vice-president of the Trust Company, and, as he says in

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his affidavit, 'and particularly in charge of the matter of executing the trusts vested in said Trust Company'—'in charge of the execution of the trusts vested in the Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company.' So now we have the minority bondholders wanting a high up-set price; the majority bondholders wanting the lowest possible price, and Mr. Krech and Mr. Rhoades, over in the corner, with the duty upon them to compel the full and true value of the property on the sale, all elements of value and all qualifying factors being considered, no more and no less. But who will Mr. Krech and Mr. Rhoades, over in that corner, wanting a full value of the property, talk to with a view to getting that price? Why, Mr. Krech, as president of the Reorganization Committee, and Mr. Rhoades, as secretary of the Reorganization Committee, who want it for the lowest possible price, and I wonder whether Mr. Rhoades affidavit is made as the vice-president of the Trust Company, or as the secretary of the Reorganization Committee?

Mr. HOW.—I am at a loss to understand what that argument is for, unless to foment and create prejudice.

Mr. McENERNEY.—It is to tell the truth about the situation out of Mr. Rhoades' affidavit.

Mr. BOWIE.—Not to appear for the intervenor?

Mr. McENERNEY.—No, sir; I don't represent the intervenor, Mr. Bowie, or anybody who has any interest in the Western Pacific properties, near or remote."

Said remarks above quoted were made by the counsel for the said Judge, in the presence of the said Judge, in the guise of advice to the said Judge, and the Judge did not in any way rebuke said counsel, or object to such argument, remarks or advice, or repudiate the same in any manner, shape or form, but, on the contrary, said Judge had theretofore declared in reference to the proceedings then being conducted before him: "Of course, I am acting under the advice of counsel."

In the said affidavit of said Judge there is set forth a certain letter, purporting to be dated March 8, 1916, addressed to Jared How, and signed by John S. Partridge, said letter being set forth on pages 13 and 14 of said affidavit. Immediately preceding said letter said affidavit stated: "That in connection with the allegations in the affidavit that John S. Partridge declined to waive the issuance of citation upon appeal, and stipulate that said appeal might be heard on the 16th day of March, affiant states that John S. Partridge has shown to affiant a copy of a letter sent to Jared How, solicitor for the Trust Company, in words and figures as follows." Then follows the letter, in which letter the said John S. Partridge, as counsel for the receivers, stated: "In regard to the first stipulation" (a stipulation waiving service of the order allowing appeal, notice of appeal and bond on appeal), "I do not see how it is possible by any such paper to inaugurate an appeal or to confer jurisdiction upon the Circuit Court of Appeals, and for that reason, and that reason alone, I beg to be excused from signing the same."

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“In regard to the second stipulation” (the stipulation referring to the record on appeal), “if you take an appeal in the manner prescribed by law, I shall certainly facilitate the establishing of the record in any manner that will fairly present the whole matter to the Court of Appeals, and it seems to me that the second stipulation presented will fairly do this. This, however, is, of course, subject to examination and verification, and suggests of any other papers which it may seem necessary or proper should constitute a part of the record.”

Said affidavit contains nothing further upon said matter than as above stated; and the direct and necessary implication from such affidavit is that, as stated in the letter of March 8, 1916, incorporated in such affidavit, the receivers were willing to enter into stipulations and waive citation necessary for the presentation of the appeal on March 16, 1916, after such appeal had been perfected. Such, however, was not the fact, for, after receiving said letter, and on the 8th day of March, 1916, Jared How, counsel for your petitioner, obtained from the Honorable William B. Gilbert, Presiding Judge of the United States Circuit Court of Appeals, an order allowing the appeal, and filed the same, together with an assignment of errors, in the office of the clerk of the United States District Court, for the Northern District of California, Second Division. Said Jared How having ascertained that if citation were issued thirty days would have to elapse before the persons to whom the citation was directed could be required to appear, thereupon determined not to have citation

issued, and forthwith presented to said John S. Partridge, counsel for said receivers, a form for a stipulation waiving citation, consenting to the hearing of the appeal on the 16th day of March, 1916; and also relating to the record on appeal. Said John S. Partridge, on said 8th day of March, 1916, after he had been advised by Jared How that the said appeal had been allowed, and after he had been requested by said Jared How to make and enter into such last-mentioned stipulation, wrote and transmitted to Jared How a letter, of which the following is a copy:

“San Francisco, Cal., March 8, 1916.

Mr. Jared How,

Mills Building,

San Francisco, Cal.

Dear Sir:

After consultation with Mr. McEnerney, I have decided that it would not be advisable to enter into the proposed stipulation. I, therefore, return it to you herewith.

Yours very truly,

(Signed) JOHN S. PARTRIDGE.”

JSP/D.

The stipulation referred to in said letter and returned therewith was the form of stipulation waiving citation last above mentioned. This letter, not mentioned in the affidavit of said Judge, was written and delivered after the letter quoted in said affidavit.

*The cause of action with which said Judge is proceeding is for the foreclosure of a mortgage securing

*Clerk's Note: See page 168 for amendment to Petition, allowed by order of Court entered May 3, 1916.

the payment of Fifty Million (\$50,000,000) Dollars of bonds of the Western Pacific Railway Company. Said Judge intends to and will in said proceeding fix and determine the up-set price for which the said property is to be sold; that said Judge will also pass upon and determine the question of the right of the petitioner, Savings Union Bank & Trust Company, to intervene in said cause. Said Judge will also in said cause pass upon and determine the compensation to be paid to John S. Partridge, counsel for the receivers and counsel for the said Judge, as herein stated.

A Plan and Agreement for the reorganization of the properties of the Western Pacific Railway Company has been framed, which Plan holders of approximately Forty-three Million Nine Hundred Thousand (\$43,900,000) Dollars par value of bonds have joined in and agreed to carry out, and holders of approximately Two Million Five Hundred Thousand (\$2,500,000) Dollars par value of bonds have agreed to co-operate in carrying out; that the said Plan and Agreement was declared operative on the 15th day of March, 1916; that such Plan and Agreement contemplates the purchase at foreclosure sale in the interest of such bondholders as shall be willing to participate therein of all the properties covered by such First Mortgage, and the issue by the purchaser forthwith of Twenty Million (\$20,000,000) Dollars par value of bonds to be secured by a first lien upon the properties so purchased. In order that such Plan and Agreement might be carried out according to its terms, it was essential that a fair market for such bonds, when issued and offered for sale should

be assured. To that end, an underwriting syndicate has been formed, and has agreed to insure the sale of such bonds at a price and upon terms which are believed to be more favorable than can again be secured, and by the terms of such underwriting agreement the underwriting syndicate is entitled to call for the bonds, the sale of which is insured by it, on or before July 1, 1916. If, through delay in the entry in said suit of your petitioner against Western Pacific Railway Company of a decree of foreclosure and sale and the enforcement of such decree it shall become impossible to carry out such Plan and Agreement prior to July 1, 1916, so that the benefit of such underwriting may be availed of, such holders of such bonds who shall have joined therein will be liable to a charge of over One Hundred Fifty Thousand (\$150,000) Dollars, and in other respects will sustain irreparable loss and injury, for the reason that it is extremely doubtful whether a new underwriting can be obtained on terms as favorable as those now existing.

That your petitioner is without remedy by appeal, and there is no means or relief open to your petitioner unless by a Writ of Mandate of this Court.

WHEREFORE, your petitioner prays that a rule may be made and may issue from this Honorable Court, directing the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division, to show cause before this Court why a Writ of *Mandamus* shall not issue commanding him to enter an order in said cause that an authenticated copy of

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such affidavit shall be forthwith certified to the Senior Circuit Judge for this Circuit then present therein.

And your petitioner does further pray that, pending the hearing and disposition of said order to show cause, said Judge be restrained and enjoined from taking any steps or proceedings in said cause, and for such other and further relief as to this Honorable Court may seem just and meet. And your petitioner will ever pray.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
Counsel for Petitioner.

State of Oregon,
County of Multnomah,—ss.

I have read the foregoing petition by me subscribed. The facts stated therein are true.

JARED HOW.

Subscribed and sworn to before me this tenth day of April, 1916.

[Seal]

FRANK L. BUCK,

Notary Public in and for the State of Oregon.

My commission expires November 4, 1916.

**Exhibit I [to Petition for Mandamus—Affidavit of
Lyman Rhoades of Personal Bias and Prejudice,
Filed Pursuant to Section 21 of the Judicial
Code].**

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 169—IN EQUITY.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

State of New York,

City and County of New York,—ss.

Lyman Rhoades, being first duly sworn, deposes
and says:

I am one of the vice-presidents of The Equitable Trust Company of New York (hereinafter called also the Trust Company), being The Equitable Trust Company of New York, as Trustee, named as plaintiff in the above-entitled action. I make this affidavit for and on behalf of said The Equitable Trust Company of New York, and of said Trust Company, as such trustee and plaintiff. I am in charge of the Trust Department of said Trust Company, and par-

ticularly in charge of the matter of executing the trusts vested in said Trust Company, and I am in charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company (hereinafter sometimes called the Railway Company) and under that certain contract B hereinafter referred to.

II.

The above-entitled cause is a suit for the foreclosure of the First Mortgage of the Railway Company, and is now pending in the United States District Court, for the Northern District of California, and in the second Division of said court, and the Hon. William C. Van Fleet is the regularly presiding Judge in said division and cause, and has exclusive control of all matters arising in said cause. Said William C. Van Fleet, Judge of said court before whom said cause is pending, has a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause above entitled. Said Judge has a personal bias and prejudice against The Equitable Trust Company of New York, as trustee and as plaintiff in the above-entitled cause. Said Judge has a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company appointed in said action, and John S. Partridge, their counsel, who have by their actions, hereinafter recited, and under the authority, or with the acquiescence of the Court, become parties to various con-

troversies which have arisen in said cause, and to which the Trust Company is also a party. Said Judge has a personal bias and prejudice in favor of the Savings Union Bank & Trust Company, which said Savings Union Bank & Trust Company (hereinafter called the "Savings Union") has sought to intervene in said cause, and to become a party thereto.

The facts and reasons for my belief that such personal bias and prejudice exist are as follows:

III.

There are pending in said cause the following controversies and matters to which the Trust Company is a party.

1. A proceeding initiated by said Judge upon his own motion to enjoin the Trust Company from prosecuting a certain suit by it commenced in the United States District Court, for the Southern District of New York, against The Denver & Rio Grande Railroad Company (hereinafter called the Denver Company) and others. This proceeding is being prosecuted by said Receivers and their counsel at the instance of said Judge, and defended by the Trust Company.

2. An application by the Trust Company, as complainant herein, for a decree of foreclosure and sale of the property of the Railway Company subject to said First Mortgage. This application is opposed by said Receivers and their said counsel. Upon the hearing of said application, if the Court shall hear the same, the question of what, if any, up-set price

shall be fixed as the minimum price to be accepted for the property to be sold, will necessarily arise.

3. A proceeding initiated by the Judge upon his own motion to bring said Denver Company into this cause as a party defendant, and to determine in this said cause its liability under a certain agreement dated June 23, 1905, between The Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company (predecessors and constituent corporations of said Denver Company), the Railway Company and the Trustee under its said First Mortgage, commonly known and herein called "Contract B," and, if possible, to enforce the same. (Copies of said Contract B have been filed in this cause and are part of the record therein, and I pray leave to refer to the same as if a full copy thereof were incorporated in this affidavit.) Such liability arises from an obligation upon the part of the Denver Company to pay to the Trust Company for the holders of said First Mortgage bonds the difference between the amount due from the Railway Company for interest and sinking fund payable upon its said First Mortgage bonds, and the amount actually paid by the Railway Company on account of the same. This proceeding is being conducted by the Receivers and their counsel by direction of the Court, and is opposed by the Trust Company.

4. An application of said Savings Union to be permitted to intervene in said cause, in order that it may participate in the prosecution thereof, and particularly of said claim against the Denver Company,

and oppose the entry of any decree in said cause until said claim be disposed of, and when a decree shall be entered, to procure the fixing of the largest possible up-set price. The granting of said application is opposed by the Trust Company.

IV.

Holders of a large amount (namely, about \$43,900,000 principal amount, out of \$50,000,000 outstanding) of Western Pacific First Mortgage bonds have joined in forming a Reorganization Committee, and adopting a Plan and Agreement for the reorganization of the Railway Company. Another committee has been formed in Amsterdam, Holland, by holders of such First Mortgage bonds, principally resident in Holland, and represents, as I am informed and believe, about \$3,000,000 principal amount, of such bonds; and while said committee has not as yet acted in approval or disapproval of said plan, said committee, in the matters which have arisen in connection with the suit brought by the Trust Company in the United States District Court for the Southern District of New York and the attempt of said Judge to prevent the prosecution thereof and matters consequent thereon, has acted in co-operation with said Reorganization Committee. This plan, in the opinion of the Trustee, is a proper and fair plan. All bondholders have been and are at liberty to join therein, and said Plan, in the opinion of the Trustee, in no way tends to prejudice the rights or interests of such bondholders as do not join therein. Said First Mortgage provides that the Trustee, in all pro-

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ceedings under the mortgage, shall obey the directions of the holders of a majority of said bonds, and the Trustee is co-operating with, and as in duty bound, is receiving and obeying the instructions as to such proceedings from said Reorganization Committee, as the holders of a majority in amount of said bonds. It has not, however, received any instructions, or taken any proceedings, which operate to the advantage of one set of bondholders as distinguished from another. The Judge, nevertheless, identifies the Trust Company with the Reorganization Committee, and, as appears from a colloquy between the Judge and counsel, which took place in open court on March 6, 1916, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said plan, and as the representative solely of the bondholders who have joined therein. On that occasion, the Judge said, referring to the Trust Company's application for a decree of foreclosure and sale herein, to be made for the benefit of all of the holders of said First Mortgage bonds:

“ * * * Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any particular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. * * *

The COURT.—The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. * * * Now, they are before the Court; this Court is obligated to protect their rights equally with that of any body of bondholders who may desire a different course to be pursued.”

In making this statement, and other like statements, the Judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in said plan of reorganization, and was not caring for all of the bondholders, as it is in duty bound to do, and as in fact it is doing.

Counsel for the Judge, upon the hearing on March 16th and 17th, 1916, of applications to the Circuit Court of Appeals, for the Ninth Circuit, for writs of prohibition and mandate, intended to prevent the Judge's taking in this cause said proceedings against the Denver Company and to compel the entry of a proper decree of foreclosure and sale, which applications were made by the Trust Company, clearly intimated in argument, as I am informed by counsel for the Trust Company there present, that the Trustee could not be trusted, in the opinion of the Judge, to act fairly and impartially in protecting the interests of said minority bondholders, as well as the interests of the majority bondholders.

V.

The bondholders who have joined in the formation

of the Reorganization Committee and the Trustee have been advised by their respective independent counsel, and are of the opinion, that the obligations under Contract B of The Denver Company to the Trustee and the bondholders, in respect to the making of interest and sinking fund payments, are not subject to said First Mortgage, and in this suit for the foreclosure thereof no decree is sought for the sale or other disposition of said last-mentioned obligations. It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization, and shall be improved and operated for their benefit as stockholders of a new corporation, to be formed for the purpose. It is also their desire and intention, if so permitted, that the said claim against the Denver Company shall survive in the hands of the Trust Company, as Trustee under Contract B, in order that such new corporation may, if possible, by negotiations with the Denver Company, realize therefrom, so far as such claim pertains to the bonds of said majority bondholders, the greatest possible advantage to said new corporation and its stockholders (now said bondholders), it being the purpose of the majority bondholders to pursue the prosecution of said claim against the Denver Company, so far as it pertains to their said bonds, only

in event that it shall prove impossible by means of negotiation to make a thoroughly satisfactory settlement thereof in the interest of such bondholders; but otherwise to insist upon the enforcement of the same. The majority bondholders believe, and the Trustee agrees, that the prosecution of said claim in court will almost certainly result in the insolvency and the appointment of receivers for the Denver Company, and that in consequence the entire benefit of said claim will be lost, unless the bondholders are prepared to protect themselves in the course of a reorganization of the Denver Company.

VI.

As a consequence of the foregoing considerations, the Trustee, acting as Trustee of the trust created by said Contract B, as it was advised that it was its right and duty to do, at the request of the majority bondholders (represented by a protective committee, which was the predecessor of the Reorganization Committee, as the representative of a majority in amount of said bonds, and was composed of the same individuals), in May, 1915, filed in the United States District Court, for the Southern District of New York, a bill in equity, denominated as a bill ancillary to the bill of complaint in said cause pending in this court, and procured the appointment as Receivers of the Railway Company in said District the same persons who had been appointed Receivers thereof in this Northern District of California, and thereupon filed in said United States District Court, for the Southern District of New York, a so-called depend-

ent bill, whereby the Trust Company sought as ultimate relief the enforcement of the said obligations of the Denver Company to all of said bondholders, but incidentally and primarily the enjoining of individual bondholders, whose bonds, or some of them, bore direct guaranties of interest payments endorsed thereon by the Denver Company, from enforcing said direct guaranties, inasmuch as the result of such enforcement would be to impair or impede the enforcement of the obligations of Contract B which run in favor of all holders of said Western Pacific First Mortgage bonds. (Such direct guaranties are endorsed upon only a portion of said bonds.) Upon the institution of said suit in New York, said Judge displayed resentment at the Trust Company's action in commencing the same without his permission. At the same time, both said Receiver, Frank G. Drum, and said counsel for said Receivers, John S. Partridge, were greatly disturbed, and stated, in substance, that they felt affronted by the action of the Trust Company, and expressly stated, in substance, that the action of said Trust Company was an affront to said Judge, and to themselves. Upon an application made shortly thereafter by said Receivers for instructions as to whether they should institute suit for the enforcement of the Denver Company's said obligations, said Judge of his own motion issued an order, directed to the Trust Company, to show cause why it should not be enjoined from prosecuting or taking other proceedings in said suit pending in New York. And subsequently said

Judge rendered an opinion, and of his own motion caused to be entered an order enjoining the Trust Company from taking any further proceedings in said cause, and likewise, although no application therefor had been made by anybody, enjoining the Trust Company from prosecuting said obligations of the Denver Company in any court save in the court of said Judge, or taking any action with respect to said obligations of the Denver Company, or which might affect the same, without the permission of said Court, that is to say, of said Judge. Subsequently, and upon the hearing of an appeal from said order taken by the Trust Company to the Circuit Court of Appeals for the Ninth Circuit and of said applications for writs of prohibition and *mandamus* above mentioned, said Judge, through his counsel, filed motions to dismiss all of the same, and demurrers to the petitions for such writs, and returns to the alternative writs, and thereby alleged and claimed that said proceeding to enjoin the Trust Company as above stated was in reality a proceeding in contempt, and that said Trust Company had been in contempt of said Judge and his said court, and has in effect, by the order of said Judge, been adjudged so to be in contempt. And said Judge and his said counsel have clearly intimated in connection with said proceedings for injunction, and for said writs of prohibition and *mandamus*, that said Judge and his said Receivers and counsel believe that the Trust Company instituted said New York suit for the purpose of evading the jurisdiction of the Judge, and that the Trust Company and the majority bondholders are

unwilling to confide their interests under said contract to the decision of said Judge, and I am informed by counsel for the Trust Company, and by counsel for the Reorganization Committee, who are familiar with the situation and the circumstances, and I verily believe, that said Judge suspects and resents the conduct of the Trust Company in instituting said New York suit. Both said Judge and counsel for the Receivers have, on several occasions, reiterated and emphasized the complaint that the Trust Company instituted said ancillary suit and filed said dependent bill, and obtained the appointment of said Warren Olney, Jr., and Frank G. Drum as Receivers under said ancillary bill without the permission of said Judge, and without any authority from him so to do, although the fact is that it is not necessary nor customary in such circumstances to obtain the permission of the Judge of primary jurisdiction for the institution of suits in ancillary jurisdictions or for proceedings thereunder, and that in point of fact no umbrage was taken by said Judge on account of the ancillary proceedings and appointment of Receivers in the District of Utah, in the Eighth Circuit, which have been actually instituted without such permission for the foreclosure of said mortgage.

VII.

In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge, if he were permitted to pass upon the matter, would have to determine and fix the up-set price to be named

in said decree, that is to say, the minimum amount for which the mortgaged property may be sold under such decree, which said up-set price. if the amount for which the property is in fact sold shall not be higher by reason of competitive bidding, will determine the amount of the distributive shares of holders of said Western Pacific First Mortgage bonds and therefore, if the property be purchased by or at the instance of the Reorganization Committee for the benefit of the majority bondholders, the amount which the majority bondholders shall be compelled to pay to each of the minority bondholders for his or her interest in the mortgaged property; such bondholder, however, retaining his or her claim against the Denver Company under Contract B for the interest already accrued, unpaid and unprovided for and for the interest and sinking fund payable upon the portion of the bond principal not paid through the application of the proceeds of such sale. Inasmuch as the Denver Company's obligation under Contract B is only to make up deficits in interest payments and sinking fund payments of only \$50,000 per year, it is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered,

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—no more no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge constituted himself the special guardian and champion of said minority bondholders.

On June 29, 1915, upon the argument of the question whether the prosecution of said New York suit by the Trust Company should be enjoined, raised upon an order to show cause issued at the instance of said Judge, the following statement was made by said Judge as shown by the reporter's transcript of said proceedings. (The statement refers to Western Pacific First Mortgage Bonds.)

“The COURT.—I got five of them myself soon after they were issued, in 1910 I think. I paid ninety-five for them, I think. I am mistaken about the price I paid. I think I paid par for five of them and when I sold them I sold them for ninety-five. I had occasion to sell a couple of them soon after I bought them for ninety-five and the others I gave to Mrs. Van Fleet and I think she got a very little for them.”

As shown by the income tax certificates then in the possession of the Trust Company as Trustee under said mortgage, various members of the immediate family of said Judge, being the wife and children of said Judge, and being also members of his household, were, from the 1st day of March, 1914, until after the 1st day of September, 1914, severally owners in various amounts of First Mortgage bonds of Western Pacific Railway Company, amounting in the aggregate to approximately nine thousand (\$9,000) dol-

lars principal amount, and a sister-in-law of said Judge, who is a member of his household, was at the same time the owner of First Mortgage bonds of said Railway Company in the principal amount of three thousand (\$3,000) dollars. I am credibly informed, and on such information state, that said bonds, three whereof seem to be the bonds mentioned by said Judge as aforesaid, were purchased by or for the persons so owning the same several years prior to said year 1914, and all thereof in or about the year 1910, and until the same were disposed of, as hereinafter stated, were owned by them. The market price of said bonds, as shown by a certain petition of said Savings Union, verified by John S. Drum, hereinafter mentioned, during the years 1910 to 1915, inclusive, were as follows:

1910: maximum 96, minimum 92; 1911: maximum 94, minimum 87; 1912: maximum 87, minimum 81; 1913: maximum 86, minimum 74; 1914: maximum 72, minimum 35; (prevailing price) January 36, February 32.

The market price of said bonds on March 1, 1914, was approximately 68.

I am credibly informed that all of said bonds, except said bonds belonging to the sister-in-law of said Judge, were disposed of by or for their said owners late in the month of February, 1915, approximately one week prior to the commencement of this cause, at which time it was a matter of common knowledge that this cause was about to be commenced in this, the court of said Judge. As I am informed that the market price of said bonds at the time of said sale

was approximately 33, the loss suffered by the owners of said bonds through the purchase and disposition thereof as aforesaid must necessarily have amounted to several thousand dollars. I have no positive knowledge that said bonds of the said sister-in-law of said Judge have not been disposed of by her, but I have made inquiry concerning said matters, and have been unable to ascertain that the same have been disposed of, and upon the contrary, I am informed and believe that his said sister-in-law was the owner of said bonds subsequently to the promulgation of the above-mentioned Plan of Reorganization, which was not adopted until after December 15, 1915, and that she has not deposited the same under said Plan.

VIII.

Said Railway Company never in any year made net earnings sufficient to pay as much as one-half of the amount due as interest upon its said First Mortgage bonds, or to pay any of the amount payable into the sinking fund therefor. Said bonds were sold to the public largely upon the faith of the obligation assumed by the Denver Company in said Contract B to make said interest and sinking fund payments. Said bonds came into default, and the foreclosure of said First Mortgage became necessary, because the Denver Company ceased, in March, 1915, to pay the interest upon said bonds, or to make up the deficit in interest payments thereon, although previously it had made up all such deficits. As a consequence, holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is

responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds.

Upon the argument of said applications for writs of prohibition and *mandamus* above mentioned, counsel for said Judge, by innuendo, plainly intimated, as I am informed by counsel for the Trust Company there present, that the Trust Company (because opposed to bringing about unnecessarily a receivership of the Denver Company) was and is in collusion with the Denver Company to prevent the enforcement, or the full enforcement, of the obligation of the Denver Company with respect to said interest and sinking fund payments, and one of the counsel for said Judge in arguing said matter, and addressing the United States Circuit Court of Appeals, for the Ninth Circuit, in behalf of said Judge, said:

“When the first day of March passed, the Denver & Rio Grande owed a million and a quarter dollars in respect of its guaranty to pay that coupon interest, the date preceding the filing of the bill here involved. There was no idea of asking it to pay. It is a going concern. We have been told that if we are ruthless we will drive it into bankruptcy. Well, if I owned any of the Western Pacific bonds which had been palmed off on me by the Denver & Rio Grande, and I couldn’t get my money back, I would say, ‘Well, considering that I have been robbed of my money, I think the best thing that can happen to you is to be thrown into bankruptcy, so that you won’t do it to anybody else another time.’ ”

IX.

Upon the rendition by said Judge of his opinion directing the entry of an order enjoining the prosecution by the Trust Company of said New York suit, said Judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company be made parties to this cause, and intimated in said opinion that the obligations of the Denver Company to the Western Pacific bondholders under Contract B should be ascertained in this cause. Subsequently, on March 6, 1916, in connection with the application for the entry of a decree in this cause above mentioned, said Judge, in the course of a colloquy with counsel, stated, or plainly implied, that in his opinion the Denver Company should, if possible, be compelled to appear as a party in this cause and its said obligations be ascertained and if possible enforced. I quote from said colloquy as follows:

“The COURT.—* * * I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshalling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never

be necessary to sell the property of the Western Pacific.

Mr. HOW.—That protection has not been afforded; if it had been, the mortgage of the Western Pacific would not have gone in default.

The COURT.—That does not answer the question. The question is, what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible and is able to respond there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.

The COURT.—But the Court is bound itself to realize on the security that is submitted to its charge. It cannot turn over to anybody the obligation which rests upon it to marshal these assets.”

X.

Said Judge, at the time of the appointment of Receivers in this cause, was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr., as Receiver of the defendant Railway Company, but said Judge, of his own motion, and in order, as he explained, to have as Receiver some one with whom he was well acquainted, and in whom he had personal confidence, appointed also Frank G. Drum as a receiver with Warren Olney, Jr., and thereafter, although it was represented to him by said Warren Olney, Jr., upon behalf of said Receivers that the

then existing legal department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to the receivership, appointed John S. Partridge counsel to the Receivers, stating in effect, that he wished in that position a person with whom he was personally acquainted, and upon whom he could implicitly rely. As I am informed by counsel with whom I have consulted on this matter, said Judge had formerly been a partner in the firm of which said Partridge is a member, and the son of said Judge was at the time of such appointment, and still is, an attorney employed by and associated with said Partridge in his private practice.

On the hearing on March 6, 1916, of said application for a decree of sale, which would necessarily have been for the benefit of all of the said bondholders (there being then no creditors claiming any preference over or claiming to share equally with said bondholders, except two creditors, who consented to such decree), said Judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon said application without hearing counsel for the Receivers, and made the following statement:

“The COURT.—* * * The Court is responsible for the administration of this property. Its avenue of aid and of enlightenment is not only counsel for the respective parties, but the counsel for the Receivers and the Receivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course

which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. * * *

I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right."

Upon the hearing of the return to said order to show cause why the prosecution of said New York suit should not be enjoined, said John S. Partridge, appearing in support of the order *nisi* which had been entered by said Judge upon his own motion, argued not only that the Denver Company should be made a party defendant to this cause, but that its said obligations could be ascertained and enforced in this cause, and that an equitable lien upon its property could be declared and enforced therein, and that, if necessary, said First Mortgage of the Railway Company could be foreclosed as a mortgage in equity upon all of the property of the Denver Company.

Upon said application for decree on March 6, 1916, said John S. Partridge, appearing as counsel for said Receivers, in consequence of the insistence of said Judge that he should and would require the views of said Receivers and their said counsel as to the granting or denial of said application, opposed the entry of a decree until the obligation of the Denver Company should have been adjudicated and if possible enforced.

XI.

On said 6th day of March, 1916, after the application for said decree, said Judge adjourned the hearing of said application until two o'clock in the afternoon of said day, for the purpose of hearing counsel for the Receivers as aforesaid, and upon the hearing of said matter later in said day, said Savings Union applied for leave to be heard concerning the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause. Thereafter said Judge continued said matter for one week, in order, as he stated, to enable said Receivers to present affidavits in connection with the same, and thereafter said Savings Union presented a petition for leave to intervene as a party to said cause, and to prosecute the same and participate therein as above stated, and in said complaint of intervention, and as ground for its application for leave to intervene, charged, in substance, that said Reorganization Committee is controlled by the firms of Blair & Co., William Salomon & Co., and William A. Read & Co. (bankers in the city of New York); that the Trust Company is controlled by the Reorganization Committee; that said firms of bankers last mentioned had caused the Denver Company to default in the performance of its said obligations; had caused this foreclosure suit to be instituted; had caused said New York suit to be commenced, and had taken all said proceedings for the purpose of enabling the Denver Company to escape the perform-

ance of its obligations to Western Pacific bondholders under Contract B, and for the purpose of defeating any claim that might be made that the claims of the Western Pacific bondholders under Contract B constituted an equitable lien upon the property of the Denver Company in priority to the liens of said Company's First and Refunding Mortgage, and said Company's Adjustment Mortgage; that said firms of bankers were interested, directly or indirectly, in the bonds of the Denver Company secured by said First and Refunding Mortgage and said Adjustment Mortgage, and entertained the purpose of protecting said bonds as against the interests of Western Pacific bondholders represented by the Reorganization Committee and the Trust Company; and that the Reorganization Committee and the Trust Company are betraying the interests of their respective *cestuis que trustent*.

Upon the hearing of said applications for writs of prohibition and *mandamus* in the United States Circuit Court of Appeals, counsel for said Judge argued that one reason why said Judge should not be compelled to enter a decree of foreclosure and sale in this cause is that said application of the Savings Union for leave to intervene and file said complaint had been made, and the clear implication of said argument was that said application ought to be and would be granted by said Judge and so granted because the Trust Company had shown unfairness and partiality in the administration of its trust, and did not and could not properly represent the minority bondholders in the prosecution of this cause. In the

defense of said applications for writs of prohibition and *mandamus*, and in the argument thereof, counsel for said Savings Union, and counsel for said Judge, co-operated, and despite the fact that said charges of fraudulent conspiracy made in said proposed complaint in intervention were repeated in open court by counsel for said Savings Union, in the presence of counsel for said Judge, said statements were in no way repudiated by counsel for said Judge, or doubt concerning the same expressed, but, upon the contrary, the attitude of counsel for said Judge upon said hearing was one of acquiescence in and of endeavor to support said charges.

XII.

Said applications for writs of prohibition and *mandamus* were heard in connection with an appeal taken by the Trust Company from the order of this Court, entered upon the opinion of said Judge, enjoining the Trust Company from prosecuting said New York suit, and directing the bringing in as parties defendant of the Denver Company and said Missouri Pacific Railway Company. Said Receivers not being parties to said cause were not cited to appear as appellees upon said appeal, and, although the hearing of said appeal in connection with the application for said writs of prohibition and *mandamus* was consented to by all of the parties to said cause, the same was not consented to by said Receivers. Upon the contrary, at the time that the Trust Company was about to take its said appeal from the order of said Judge enjoining the prosecution of said New York suit, counsel for the Trust Company applied to said

John S. Partridge, as counsel for said Receivers, to join all of the parties to this said cause in waiving the issuance of citation upon said appeal, and in stipulating that said cause might be heard on March 16, 1916, together with the applications for said writs of prohibition and *mandamus*; but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said Receivers and for said Judge, he had decided that it would not be advisable to enter into such stipulation, and refused so to do. Prior to the hearing of said appeal and said applications, said Judge entered *ex parte* an order in this cause, directing counsel for said Receivers to appear upon said appeal, and to oppose the same, the body of which said order reads as follows:

“It appearing that the Equitable Trust Company of New York, plaintiff in the above-entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that the said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

WM. C. VAN FLEET,
United States District Judge.”

Although none of the parties to said cause objected to the hearing of said appeal or to the reversal of said order for injunction, said counsel for said Receivers, acting in real substance, as counsel for said Judge appeared upon the hearing thereof and moved to dismiss said appeal and argued in support of said order.

And said Judge authorized counsel for the Receivers, and Garret W. McEnerney, Esq., a member of the San Francisco bar, to represent him in opposition to said applications for said writs of prohibition and *mandamus*, although said applications were not opposed by any of the parties to said cause. Upon the hearing of said appeal and said applications, said counsel moved to dismiss said appeal upon the ground that the Receivers had not been made parties thereto or cited to appear thereon, and opposed the consideration of said appeal, upon the ground that the Court had not jurisdiction to review said injunctive order, because, as said Judge contended, said order constituted discipline for contempt and was not an injunction in the proper sense of that term, and opposed the consideration of said applications for said writs of prohibition and *mandamus*, upon the ground that the United States Circuit Court of Appeals had not jurisdiction to entertain the same, in all said matters indicating the plain intention of said Judge (notwithstanding a desire previously expressed by him, and which should have been entertained by him to obtain the judgment of said United States Circuit Court of Appeals concerning his jurisdiction to initiate and adjudicate herein said con-

troversy concerning said claims against the Denver Company and to postpone a decree in this said cause until such controversy had been adjudicated), to prevent the expression of the judgment of said Circuit Court of Appeals upon said questions and to proceed with said cause irrespective of the propriety or impropriety of the course which he had determined to adopt with reference to said matters.

Upon consideration of the facts as I have learned the same from an examination of the records in this cause, and in said Circuit Court of Appeals, and of the facts outside said records above stated, I am convinced and believe that said Judge is determined if there be any way available to him so to do, to compel the prosecution of said claims against the Denver Company before him in this cause, and that he entertains a deep resentment against said Denver Company, and that he believes (although as I verily believe, there is no foundation whatsoever for the belief), that said banking houses above named have conspired, as is charged by said Savings Union, to protect the Denver Company and the holders of certain of its bonds, against the claim of Western Pacific bondholders, at least in some part, and that said Reorganization Committee and the Trust Company are co-operating with them in so doing and that the Trust Company intends (although such is not its intention) to endeavor to secure an unduly low up-set price to be fixed by the decree herein, and that said Judge has acquired and entertains a personal bias and prejudice against it on account of said matters and things, as well as the other matters and things hereinabove recited.

XIII.

Said Plan of Reorganization was adopted by said Reorganization Committee on December 17, 1915. A copy of said Plan and the Agreement annexed thereto was delivered by one of the counsel for the Reorganization Committee to said Judge, and a copy thereof to each of said Receivers, on or prior to December 24, 1915. Immediately thereafter, formal notices of the adoption of said Plan were published in various newspapers in the State of California, and lengthy summaries thereof and comments thereon were published in most of the principal newspapers of said State, and particularly in the daily papers of San Francisco. Letters and notices were mailed by the Reorganization Committee to every bondholder whose name appeared upon the income tax certificate lists in the possession of the Trust Company, urging deposits of bonds under said Plan of Reorganization, and inasmuch as the names of the members of the family and household of said Judge who were holders of said bonds prior to the sale thereof in February, 1915, hereinabove mentioned, do appear upon said list, undoubtedly said circular letters were received by various members of the family and household of said Judge, and inasmuch as the said sister-in-law of said Judge was a holder of some of said bonds after the date of the promulgation of said Plan, and unquestionably received said circular letters, and a copy of said Plan was in the possession of said Judge, a knowledge of the contents of said Plan must necessarily have been acquired by said Judge.

Notice that the time for withdrawal of bonds deposited with the Protective Committee, which was the predecessor of said Reorganization Committee in representation of said bondholders, would expire six weeks from the date of the first publication of said Plan, to wit, on February 4, 1916, also was duly published as aforesaid, and notice that the time for deposits thereunder would expire on February 7, 1916, was so published, and was contained in said Plan. Immediately after said last-mentioned date the fact that a very large majority of said bonds, to wit, about \$43,000,000, had become subject to said Plan and Agreement of Reorganization, was published throughout the United States, and particularly in the city and county of San Francisco. The fact also that the financial requirements of said Plan, amounting to \$18,000,000 in cash, had been fully underwritten, and money necessary for the carrying out of said plan, and particularly for the extension of the lines of Western Pacific Railway Company in the State of California, and for the rehabilitation and betterment of its existing lines had been provided, was also so published, and was a matter of common knowledge. It also appeared by reference to said Plan, and the fact was published generally in the papers of the city and county of San Francisco, and was a matter of common knowledge, that if said Plan was to be carried into execution it would be necessary that the same be declared operative by said Reorganization Committee before March 15, 1916, and that if it should not be declared operative before said

date it would cease to be binding upon the depositors thereunder and all such depositors would be at liberty to withdraw their bonds therefrom and said Plan would fail.

During the period which elapsed between December 24, 1915, and February 21, 1916, neither the Trust Company, nor any of the counsel for the Trust Company or said Reorganization Committee, nor anyone connected with any thereof, so far as I have been able to ascertain, ever was apprised in any manner that there was, or would be, any active opposition to the carrying out of said Plan. It was a matter of common and necessary knowledge that a prerequisite to carrying out the same was the entry of a decree of foreclosure and sale in this said cause, and there was never, as I am informed and believe, any intimation during said interval that there would be any objection upon the part either of said Judge or of said Receivers, or of counsel for said Receivers, to the entry of such decree of foreclosure and sale.

Said Plan of Reorganization contemplates the sale under the decree of foreclosure and sale to be entered in this said cause of the rights of Western Pacific Railway Company as such under said Contract B, that is to say, rights under the traffic and trackage provisions of said Contract B, in connection with said Railway's other property, but does not require or contemplate in any contingency the sale of any of the rights of the holders of the bonds of said Company, either with respect to interest payments or sinking fund payments at any such sale, or in this

cause at all, and I am advised by counsel for the Trust Company and said Reorganization Committee that there is no reason whatsoever, if said Judge were willing to direct such course to be pursued, that the said rights of Western Pacific Railway Company, whatsoever the same may be, should not be so disposed of (the rights of said bondholders surviving), and that in such event no bondholder will be prevented from causing his own claims to be enforced thereafter by the Trust Company, as Trustee, under said Contract B, and that if said Judge is of the opinion that the claims of said bondholders against said Denver Company should be ascertained by him, or even enforced in this cause, proceedings to that end, if they be warranted at all, may be taken as well after decree of foreclosure and sale as before such decree.

Nevertheless, on February 21, 1916, said Judge, without allowing any party to this cause any opportunity to be heard concerning the desirability or consequence of such action upon the execution of said Plan of Reorganization, and notwithstanding that the prosecution of said New York suit had already been and then was stayed by a restraining order issued by said Judge at his own instance, and that said Judge had been advised by the petition of one S. C. Wright filed herein and on the same day denied by said Judge, of the purpose of the Trust Company to apply for a decree of sale herein in advance of any attempt to enforce the claims of bondholders against the Denver Company under Contract B,

delivered an opinion in the proceeding to enjoin the Trust Company from proceeding with said New York suit, wherein he directed an order to be entered enjoining said suit, and that said Denver Company and said Missouri Pacific Railway Company be made parties defendant to this cause, and indicated his opinion that the obligations of said Denver Company to said bondholders under Contract B, must be ascertained, and possibly enforced in this cause. In a colloquy between counsel for the Reorganization Committee and the Judge, there was also an intimation, although not very distinct, that said Judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure and sale to be entered therein.

At the time the opinion of said Judge was handed down, one of the counsel for the Reorganization Committee suggested to said Judge that the effect of the entry of the order directed in said decision so far as it would initiate new proceedings and would require new parties to be brought in, might be to interfere very seriously with the carrying out of said Plan of Reorganization, and would jeopardize the success of the same, and requested said Judge to delay the entry of that portion of said order until a hearing could be had, and a showing made to him, of the interest of the bondholders as a whole to have said Plan carried out and of the effect upon the success thereof of the order which said judge proposed to enter. Said Judge, however, peremptorily refused to delay the entry of said order, or any part

thereof, and directed the same to be entered, and directed counsel for said Receivers to cause the same to be served upon said Denver Company and said Missouri Pacific Railway Company, and said Companies to be brought into said cause as parties defendant thereto.

Subsequently, and in order that, if possible, an early decree of foreclosure and sale might be had in this said cause, as was absolutely requisite to the execution of said Plan of Reorganization, and in order that the parties in interest might be advised, as it was essential they should be, whether said Judge would in fact permit a decree of foreclosure and sale to be entered with seasonable promptness, counsel for the Trust Company prepared and, as hereinbefore stated, on March 6, 1916, caused to be presented to said Judge in open court a form of decree of foreclosure and sale, which said counsel had previously presented to all of the other parties to this said cause, and to the only creditors claiming preferences therein, who, without exception, had consented and stipulated to the prompt entry thereof. Upon the hearing upon said application said Judge refused to enter said decree, stating, in effect, that until the United States Circuit Court of Appeals of the Ninth Circuit had disposed of said application for a writ of prohibition, which had been made between February 21 and March 6, 1916, he would not pass upon the application for decree, and, in effect, that if his jurisdiction to adjudicate said claims against the Denver Company in this said

cause was not denied by the Circuit Court of Appeals after hearing said application, he would not direct the entry of any decree until the matters of the bondholders' claim against said Denver Company should be disposed of by him. At the same time, said Judge, although requested so to do, refused either to direct the entry of said decree, or to deny the application for the entry thereof, although the suggestion that an order denying said application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals on a proceeding for *mandamus*. Said Judge manifestly intended to prevent such review, and the expression of the views of said Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

From a consideration of the facts aforesaid, and also of the proceedings which have been taken, as stated elsewhere in this affidavit, to prevent the rendition of any judgment by the Circuit Court of Appeals preventing said Judge from carrying out his purpose to compel a litigation of said matters with said Denver Company in this said court and cause, and compelling said Judge to enter a proper decree of foreclosure and sale herein, I am convinced that said Judge rendered said decision, and refused to permit the entry of said decree in the full belief that his said action would probably defeat the carrying out of said Plan of Reorganization and with the desire that such should be the result thereof, and that

said Judge is personally opposed to said Plan of Reorganization, and is determined to defeat the same.

As in this affidavit above stated, said Judge is aware that the Trust Company, as in duty bound, has co-operated, in various proper ways, with said Reorganization Committee in the endeavor to carry out said Plan of Reorganization, and identifies said Trust Company with said Reorganization Committee, and believes that it is a partisan of said Plan, and of the bondholders who have joined therein, and I verily believe he has a personal prejudice against the Trust Company by reason, among other things, of its said co-operation with the Reorganization Committee in the endeavor to carry out said Plan of Reorganization.

XIV.

At various times during the administration of the receivership in this cause, as I am informed by counsel for the Trust Company, counsel for the Receivers have submitted to the Court applications for orders authorizing the Receivers to adopt contracts, leases or other arrangements, made by the Railway Company with third parties, and also applications for orders authorizing the Receivers to enter into contracts, leases, or other arrangements with third parties, for or in connection with the use of property. Upon said applications, counsel for complainant, who has appeared thereon, has frequently objected to the making of any such orders if the same purported to operate, or if the same could operate by their own force, beyond the period of the receivership. When such objections were

originally made by counsel, said John S. Partridge, as counsel for the Receivers, took the position that said orders could, would and should so operate, but said Judge, after considering the question, stated that, in his opinion, the proper construction of said orders should be that they would not operate except during the period of the Court's control of the property through its Receivers, unless they should expressly provide to the contrary. Counsel for the complainant requested the Court either to incorporate such statement in each order, or to enter a standing order directing that such construction should be given to every such order in absence of a contrary declaration in the order itself. Said Judge, notwithstanding the fact that he had expressed the view above stated with respect to the proper construction of such orders and that said John S. Partridge had previously expressed a contrary view and that said orders did not by their terms contain any limitation, stated that he would incorporate such statements in said orders, or make such standing orders, if, but not unless, said John S. Partridge as such counsel would consent thereto.

Shortly after said Judge, upon his own motion, directed the issuance of an order in this cause restraining the Trust Company from prosecuting said New York suit, pending decision upon the order to show cause why an injunction should not issue, counsel for the Reorganization Committee called upon said Judge at his Chambers, and represented to said Judge that the primary object of maintain-

ing said bill in New York was to obtain an injunction restraining the prosecution of suits against the Denver Company by individual bondholders suing upon direct guaranties, to the detriment of all other bondholders, and that the restraining order made in this proceeding was so broad that even this limited object could not be accomplished and said counsel suggested to the Judge that it was to the best interests of the bondholders as a whole so to modify the restraining order as to permit proceedings to be taken in the New York jurisdiction, for the sole purpose of obtaining injunctions against such suits by individual bondholders against the Denver Company which might create preferences or otherwise result in embarrasssment to the bondholders as a whole, and counsel stated that the modification of the restraining order so as to permit injunctions to be issued against individual bondholders would further that end. The said Judge, nevertheless, stated that he would not make any order modifying the restraining order in any manner, unless such modification were consented to by counsel for the Receivers, but also stated that if such modification were so consented to, the same would be made.

XV.

By reason of the facts above stated with respect to and connected with the appointment of said Frank G. Drum as one of the Receivers of Western Pacific railway Company, and the appointment of said John S. Partridge as counsel for said Receivers, and the action of said Judge in instituting, and of said Part-

ridge in prosecuting, said injunction proceedings to restrain the prosecution of said New York suit, and the suggestion by said Partridge in argument of proceedings for bringing in the Denver Company as a party defendant in this cause, and the action of said Judge, on his own motion, in directing the same, and the declared purpose of both said Judge and said Partridge to compel an adjudication upon said claims against said Denver Company before the entry of decree herein, and the expressions of said Judge, hereinabove related, with respect to relying upon said Receivers and said counsel, and looking to them for information and guidance, and the action of said Judge, hereinabove related, in confiding the defense of said applications for writs of prohibition and *mandamus* to counsel for said Receivers, and particularly said John S. Partridge, and in directing said counsel to oppose the consideration of said appeal, and in permitting his said counsel to co-operate upon the hearing of said applications for writs of prohibition and *mandamus* with said Savings Union and its counsel, and of the action of said Judge in submitting his judgment to, and following the wishes of, said John S. Partridge as counsel for said Receivers in said matters last above mentioned, I am led to believe, and do believe, and so charge, that said Judge has a personal bias and prejudice in favor of said Receivers and their said counsel, as well as against the Trust Company.

XVI.

The complaint in intervention of said Savings Union was made and presented to the Court at the

instance of John S. Drum, Esq., who is the president of said Savings Union and a stockholder therein, and who verified said complaint. Said John S. Drum is the younger brother of Frank G. Drum, who, as above stated, is one of the Receivers of the Railway Company appointed by said Judge, and one of the especially trusted representatives and confidential advisers of said Judge.

The hearing of the said appeal from the injunction directed by said Judge against the prosecution of said New York suit, and upon said applications for writs of prohibition and *mandamus*, took place before the United States Circuit Court of Appeals, for the Ninth Circuit, sitting in the city and county of San Francisco. At the opening of court on Thursday, the 16th day of March, 1916, counsel for said Savings Union stated to the Court that in connection with the applications for the writs of prohibition and *mandamus* he appeared on behalf of said Savings Union, and asked leave to file a petition in opposition to the issuance of the writ of prohibition, and asked that it might be argued in connection with the whole matter, and the fact that an application of the Savings Union for leave to intervene in this said cause had been made was referred to by counsel for said Judge as a ground of objection upon his part to the granting of the writ of prohibition, and more particularly the writ of *mandamus* then applied for in said United States Circuit Court of Appeals, and both said facts were referred to in said newspapers, and must necessarily have come to the knowledge of said Judge. On Friday, March 17, 1916, counsel

for said Savings Union again appeared, co-operating and as if associated with counsel for said Judge, and argued at length in support of their said petition for leave to intervene, making various charges of fraud and bad faith against the Trust Company, and those with whom said counsel alleged the Trust Company had co-operated in respect to its actions as Trustee under said Mortgage and under said Contract B. No protest was made by said Judge, or his counsel, against this proceeding upon the part of said Savings Union, but counsel for said Judge, not only by so relying upon the existence of said application, but also by endeavoring in argument, as elsewhere stated herein, to create the impression that said complaint in intervention and the charges of fraud made therein were justified, and by insinuating that said Judge might have acted as he did because he had inferred upon his own account the truth of the frauds so charged, by implication and innuendo supported such charges of fraud, and in effect said action of said Savings Union. Wherefore, I am led to believe, and do believe, and so charge, that said Judge has a personal bias and prejudice in favor of said Savings Union.

XVII.

This affidavit was not filed ten days before the beginning of the pending term of court of said United States District Court, for the Northern District of California, to wit, prior to March 6, 1916, for the following reasons:

The plaintiff is a New York corporation, having its principal offices in the city of New York, where

I reside, and having no branch offices or representatives in the city and county of San Francisco, or in the portion of the United States west of the city of New York; that none of the facts and things herein stated, other than the general course of the proceedings in said cause, the appointment of said Frank G. Drum as one of said Receivers, the appointment of said John S. Partridge as attorney for the said Receivers, and the rendition of the opinion of said Judge on February 21, 1916, and the fact that said Judge and counsel for said Receivers had apparently taken umbrage to some extent on account of the prosecution of said New York suit without said Judge's permission, were known to the Trust Company, or any of its officers or agents until after March 6, 1916; that, as I am informed by counsel for the Trust Company, Jared How, Esq., one of said counsel, resident in San Francisco, was familiar prior to March 6, 1916, with the matters above stated which had occurred prior to said day. He, nevertheless, believed, as he has informed me, that in spite thereof said Judge could not and would not refuse to enter a proper decree in this cause whenever the same should be ready for decree, or if all of the parties thereto should stipulate for the entry of such decree, and that despite the fact that there was contained in the opinion of said Judge rendered on the 21st day of February, 1916, an intimation that he considered it necessary that the obligations of the Denver Company should be enforced in this cause, there was not then any clear intimation that he considered it essential that the same should be so enforced prior

to the entry of decree of foreclosure and sale herein, and that said counsel believed that whenever an application for a decree, consented to by all parties to said cause, should be presented to said Judge, he would be bound to grant the same, whether or not he should determine to proceed in the cause with the prosecution of said claims against the Denver Company; and that it was not until after the refusal of said Judge to proceed to decree in said cause on March 6, 1916, that counsel for the Trust Company had any clear ground for the belief that the personal bias and prejudice of said Judge was influencing him and might continue to influence him in his conduct and decisions in said cause to the substantial and irreparable injury of the interests of the bondholders of the Railway Company and of the Trust Company as their trustee; and it was not until after the complaint in intervention of the Savings Union had been filed in the District Court, and the charges of fraud and bad faith therein contained had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of March, 1916, and had been acquiesced in, and apparently approved by, counsel for said Hon. William C. Van Fleet (said counsel then and there collaborating with counsel for the proposed intervenor), as justifying the action taken by said Judge before any such charges were made, that any director, officer or agent of, or counsel for, the Trust Company became fully convinced that said Hon. William C. Van Fleet had a personal bias and prejudice against the complain-

ant herein, which would cause him to persist in denying to the complainant the relief to which it is entitled in said cause and so seriously influenced him therein as to make it the duty of the Trust Company to cause an affidavit of prejudice to be filed herein. Shortly after receiving information of the action of said Judge on said 6th day of March, 1916, from its counsel in San Francisco and forthwith upon receiving information that said Savings Union had on March 13, 1916, applied for leave to intervene in said cause and file herein its said complaint in intervention and of the character of said complaint and that the apparent purpose thereof and of said Judge was to postpone indefinitely the entry herein of a decree of foreclosure and sale and being requested so to do by the President and New York counsel of the Trust Company, on March 14, 1916, I left the city of New York and went directly to the city of San Francisco, arriving therein on the 18th day of March, 1916. I forthwith proceeded to interview various persons, and particularly the counsel for the Trust Company present in San Francisco, and the counsel for the Reorganization Committee present in said city, and to examine the various papers and documents in this cause herein referred to, and by such inquiry and investigation familiarized myself with the facts and circumstances hereinabove set forth. As the result of such inquiries and investigation, I became satisfied that such personal bias and prejudice on the part of said Judge does exist and that it would be impossible by reason of the same for the complainant

herein to obtain a fair consideration for and reasonably prompt enforcement of its rights and the rights of all said bondholders while said Judge should remain in control of said cause or the administration of said receivership herein and that it was necessary and the duty of the Trust Company to cause this affidavit to be filed herein. Nevertheless, I was advised by counsel for the Trust Company that, inasmuch as said applications for writs of prohibition and *mandamus* had been submitted to said Circuit Court of Appeals and as at least the question of the power of said Judge to compel the litigation of said claims of said bondholders against the Denver Company and to postpone the entry of a decree herein until the conclusion of such litigation had been submitted thereupon to said Circuit Court of Appeals, it would not be proper to file this or any such affidavit, until after the decision thereon of said Circuit Court of Appeals should be rendered unless it should be necessary so to do in order to prevent said Judge from acting in the meantime with respect to some one or more of said controverted matters hereinabove mentioned. On March 20, 1916, said Judge announced that he would not act in such matters until the decision of said Circuit Court of Appeals should be rendered and thereupon I returned to the city of New York and reported the facts stated in this affidavit, and the other facts and opinions which I had gotten concerning the attitude and conduct of said Judge to the President and Executive Committee of the Trust Company. Thereafter and at the first meeting of said Executive Committee held

after my return, to wit, on March 29, 1916, the Executive Committee considered my said report and also a resolution which on March 20, 1916, had been adopted by said Reorganization Committee requesting the Trust Company so to do and thereupon adopted a resolution authorizing the execution of an affidavit of bias and prejudice in such form as should be approved by counsel for the Trust Company under my supervision, and requesting me to verify the same and cause the same to be filed not only as my individual act but upon behalf of the Trust Company and therein to insist that said Judge shall proceed to further in this said cause and otherwise as hereinbelow prayed. Accordingly I have, at this my earliest opportunity thereafter, verified this affidavit, which has been so approved by said counsel.

WHEREFORE, I, individually, and on behalf and as the authorized officer of said complainant, The Equitable Trust Company of New York, do now and hereby pray and insist that said Judge, the Hon. William C. Van Fleet, shall proceed no further in this said cause, or in any matter arising therein, and that another Judge shall be designated therefor, in the manner by law prescribed, and that said Judge shall cause the fact of this affidavit and application to be entered on the records of the court, and also an order that an authenticated copy hereof shall be forthwith certified to the senior Circuit Judge for this Ninth Circuit, then present in said circuit; and for such further proceedings as are prescribed by law.

LYMAN RHOADES.

64 *In re Petition of Equitable Trust Company.*

Subscribed and sworn to before me this 29th day of March, 1916.

[Seal] MYLES M. BOURKE,
Notary Public, New York County No. 222, Register's
Office No. 6148.

Term expires March 30, 1916.

I HEREBY CERTIFY that I am the counsel of record of the complainant in the above-entitled cause, The Equitable Trust Company of New York, as Trustee, and that I reside in the city of San Francisco, and am a member of the bar of the United States District Court, for the Northern District of California, and that I am familiar with the proceedings in said cause, and have read the affidavit of Lyman Rhoades, to which this certificate is appended, and that such affidavit and application are made in good faith.

JARED HOW,
Counsel of Record for said Complainant, The Equitable Trust Company of New York.

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF
NEW YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

An affidavit of personal bias and prejudice and application that another Judge shall be designated for further proceedings in this action, accompanied by a certificate of counsel of record for plaintiff herein that such affidavit and application are made in good faith, having been filed by said plaintiff in this action.

IT IS HEREBY ORDERED that the fact of the filing of such affidavit and application be entered on the records of the court and that an authenticated copy thereof shall be forthwith certified to the Senior Circuit Judge for this circuit now present in the circuit, to the end that such proceedings may be had thereon as are provided by law.

Dated, this 3d day of April, 1916.

District Judge.

**Exhibit II [to Petition for Mandamus Proceedings
Had April 3, 1916, Re Motion to Disqualify, etc.].**

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY—No. 169.

Before Hon. W. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF
NEW YORK

vs.

WESTERN PACIFIC RAILWAY COMPANY,
et al.,

Monday, April 3d, 1916.

REPORTER'S TRANSCRIPT.

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AFFIDAVIT AND PROCEEDINGS ON MOTION
TO DISQUALIFY, ETC.

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 169.

Before Hon. WM. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
et al.,

Defendants.

Monday, April 3d, 1916.

Counsel Appearing:

For the Equitable Trust Co. of New York, Trustee:
JARED HOW, Esq.

For the Central Trust Co.: T. A. THACHER, Esq.

For the Boca & Loyalton Railroad: Messrs. SLACK
& GOODRICH.

For the Savings Union Bank & Trust Company:
Messrs. PILLSBURY, MADISON & SUTRO.

For the Reorganization Committee: JOHN F.
BOWIE, Esq.

For the Receivers: JOHN S. PARTRIDGE, Esq.

The COURT.—Any *ex parte* matters?

Mr. HOW.—In the case of the Equitable Trust Company of New York vs. the Western Pacific Railway Company, there has been filed an affidavit to the effect that your Honor entertains personal prejudice against the plaintiff.

The COURT.—Against whom?

Mr. HOW.—Against the plaintiff.

The COURT.—A corporation?

Mr. HOW.—Yes, your Honor, the Equitable Trust Company of New York, the plaintiff in the suit.

The COURT.—What is the basis of it? I don't even know the plaintiff, except as a corporation.

Mr. HOW.—The affidavit is about 30 pages long. I received it this morning and have read it, and have certified it as counsel of record as having been made in good faith. I should hesitate to attempt to state to your Honor the full contents of it.

The COURT.—How do you propose that I become possessed of it?

Mr. HOW.—It has been filed.

The COURT.—Well, suppose it has? It must be presented to the Court in some way, must it not?

Mr. HOW.—Not under the statute. I suggest to your Honor that the statute, section 21 of the Judicial Code, provides that upon the filing of the affidavit the Judge shall take no further proceedings in the cause, but shall forthwith certify to the Senior Circuit Judge then in the circuit the fact that the affidavit has been filed, with a copy of the affidavit and the application. The application is for the des-

ignating of another judge for further proceedings in the cause.

The COURT.—The court would certainly not be justified in making any such order until he saw that the affidavit was one that the statute contemplated.

Mr. HOW.—I think that the Circuit Court of Appeals for this circuit has held that the matter of whether the affidavit is sufficient, or not, is not for this Court to determine.

The COURT.—Well, you had better present authorities on that.

Mr. HOW.—I suggest to the Court that the affidavit has been filed, and I suggest to the Court that the Court can take no further proceedings in the action, and I submit to your Honor the form of an order.

The COURT.—I would not be disposed to acquiesce in that view unless you have some authorities on the subject.

Mr. HOW.—I am not prepared with authorities, your Honor, now. I filed this this morning forthwith upon receiving it, under instructions.

The COURT.—Then I will request you to read it. The mere filing of the affidavit does not satisfy the statute. Of course, if it is a mere attack upon a Judge growing out of the fact that a party thinks it will be prejudiced by reason of permitting it to remain with him, that is one thing; if it is a matter of substance, that is another thing. Of course, no Court can be expected to sit silent and permit an attack of that kind to be made upon it without knowing what it is; it cannot fold its hands and surrender

its jurisdiction if it is properly exercising it. The mere filing of an affidavit does not satisfy the statute. It depends upon what the affidavit is. Of course, it always has been held, so far as my observation is concerned, that so far as it tends to disclose any facts upon which prejudice may be predicated, the Judge assailed is entitled to file a response, file a statement of what the fact is. It would be a monstrous proposition if a party, merely because they might have in view some other person or some other tribunal that would be subservient to their interests could attack a Judge merely for the purpose of disqualifying him.

Mr. HOW.—I understand your Honor wants me to read this affidavit?

The COURT.—Yes.

Mr. HOW.—I protest against doing that, because I think the filing of the affidavit is all that is required. I am quite willing to read it, though.

The COURT.—Well, I am not insistent on subjecting you to the physical task of reading the affidavit, Mr. How, but I must be made acquainted with its contents.

Mr. HOW.—Oh, I don't mind the physical part of it at all, your Honor. I will read it.

“In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

“THE EQUITABLE TRUST COMPANY OF
NEW YORK, as Trustee,

Plaintiff,

vs.

“WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

“AFFIDAVIT OF PERSONAL BIAS AND
PREJUDICE, FILED PURSUANT TO SEC-
TION 21 OF THE JUDICIAL CODE.

“State of New York,

“City and County of New York,—ss.

“Lyman Rhoades, being first duly sworn, deposes and says:

“I.

“I am one of the vice-presidents of The Equitable Trust Company of New York (hereinafter called also the Trust Company), being The Equitable Trust Company of New York, as Trustee, named as plaintiff in the above-entitled action. I make this affidavit for and on behalf of said The Equitable Trust Company of New York, and of said Trust Company, as such Trustee and plaintiff. I am in charge of the Trust Department of said Trust Company, and particularly in charge of the matter of executing the trusts vested in said Trust Company, and I am in

charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company (hereinafter sometimes called the Railway Company), and under that certain Contract B hereinafter referred to.

“II.

“The above-entitled cause is a suit for the foreclosure of the First Mortgage of the Railway Company, and is now pending in the United States District Court, for the Northern District of California, and in the Second Division of said court, and the Hon. William C. Van Fleet is the regularly presiding Judge in said Division and cause, and has exclusive control of all matters arising in said cause. Said William C. Van Fleet, Judge of said court before whom said cause is pending, has a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause above-entitled. Said Judge has a personal bias and prejudice against The Equitable Trust Company of New York, as Trustee and as plaintiff in the above-entitled cause. Said Judge has a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company appointed in said action, and John S. Partridge, their counsel, who have by their actions, hereinafter recited, and under the authority, or with the acquiescence of the Court, become parties to various controversies which have arisen in said cause, and to which the Trust Company is also a party. Said Judge has a personal bias and prejudice in favor of the Savings Union Bank &

Trust Company, which said Savings Union Bank & Trust Company (hereinafter called the 'Savings Union') has sought to intervene in said cause, and to become a party thereto."—

The COURT.—That evidently was made before the decision of the Circuit Court of Appeals, wasn't it?

Mr. HOW.—It was made on the 29th day of March, 1916.

The COURT.—That was the day on which the opinion was filed.

Mr. HOW.—Yes, it was.

The COURT.—So, the affidavit was really made before the opinion was filed.

Mr. HOW.—News of that opinion did not get to them until very late in the afternoon; I think this was in the mail at the time.

"The facts and reasons for my belief that such personal bias and prejudice exist are as follows:

"III.

"There are pending in said cause the following controversies and matters to which the Trust Company is a party:

"1. A proceeding initiated by said Judge upon his own motion to enjoin the Trust Company from prosecuting a certain suit by it commenced in the United States District Court, for the Southern District of New York, against the Denver & Rio Grande Railroad Company (hereinafter called the Denver Company) and others. This proceeding is being prosecuted by said Receivers and their counsel at the instance of said Judge, and defended by the Trust Company.

“2. An application by the Trust Company, as complainant herein, for a decree of foreclosure and sale of the property of the Railway Company subject to said First Mortgage. This application is opposed by said Receivers and their said counsel. Upon the hearing of said application, if the Court shall hear the same, the question of what, if any, up-set price shall be fixed as the minimum price to be accepted for the property to be sold, will necessarily arise.

“3. A proceeding initiated by the Judge upon his own motion to bring said Denver Company into this cause as a party defendant, and to determine in this said cause its liability under a certain agreement dated June 23, 1905, between The Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company (predecessors and constituent corporations of said Denver Company), the Railway Company and the Trustee under its said First Mortgage, commonly known and herein called ‘Contract B,’ and, if possible, to enforce the same. (Copies of said Contract B have been filed in this cause and are part of the record therein, and I pray leave to refer to the same as if a full copy thereof were incorporated in this affidavit.) Such liability arises from an obligation upon the part of the Denver Company to pay to the Trust Company for the holders of said First Mortgage bonds the difference between the amount due from the Railway Company for interest and sinking fund payable upon its said First Mortgage bonds, and the amount actually paid by the Railway Company on account of the same.

This proceeding is being conducted by the Receivers and their counsel by direction of the Court, and is opposed by the Trust Company.

"4. An application of said Savings Union to be permitted to intervene in said cause, in order that it may participate in the prosecution thereof, and particularly of said claim against the Denver Company, and oppose the entry of any decree in said cause until said claim be disposed of, and when a decree shall be entered, to procure the fixing of the largest possible up-set price. The granting of said application is opposed by the Trust Company.

"IV.

"Holders of a large amount (namely, about \$43,900,000 principal amount, out of \$50,000,000 outstanding) of Western Pacific Mortgage bonds have joined in forming a Reorganization Committee, and adopting a Plan and Agreement for the reorganization of the Railway Company. Another committee has been formed in Amsterdam, Holland, by holders of such First Mortgage bonds, principally resident in Holland, and represents, as I am informed and believe, about \$3,000,000 principal amount, of such bonds; and while said committee has not as yet acted in approval or disapproval of said Plan, said Committee, in the matters which have arisen in connection with the suit brought by the Trust Company in the United States District Court for the Southern District of New York and the attempt of said Judge to prevent the prosecution thereof and matters consequent thereon, has acted in co-operation with said Reorganization Committee. This Plan, in the

opinion of the Trustee, is a proper and fair plan. All bondholders have been and are at liberty to join therein, and said Plan, in the opinion of the Trustee, in no way tends to prejudice the rights or interests of such bondholders as do not join therein. Said First Mortgage provides that the Trustee, in all proceedings under the Mortgage, shall obey the directions of the holders of a majority of said bonds, and the Trustee is co-operating with, and as in duty bound, is receiving and obeying the instructions as to such proceedings from said Reorganization Committee, as the holders of a majority in amount of said bonds. It has not, however, received any instructions, or taken any proceedings, which operate to the advantage of one set of bondholders as distinguished from another. The Judge, nevertheless, identifies the Trust Company with the Reorganization Committee, and, as appears from a colloquy between the Judge and counsel, which took place in open court on March 6, 1916, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said Plan, and as the representative solely of the bondholders who have joined therein. On that occasion, the Judge said, referring to the Trust Company's application for a decree of foreclosure and sale herein, to be made for the benefit of all of the holders of said First Mortgage bonds:

“ * * * Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any par-

ticular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. * * *

“ ‘The COURT.—The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. * * * ’ ”

The COURT.—Do they controvert that proposition?

Mr. HOW.—I would rather read the affidavit.

The COURT.—Well, proceed.

Mr. HOW.—(Reading:) “ ‘Now, they are before the Court; this Court is obligated to protect their rights equally with that of any body of bondholders who may desire a different course to be pursued. ’

“In making this statement, and other like statements, the Judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in said Plan of Reorganization, and was not caring for all of the bondholders, as it is in duty bound to do, and as in fact it is doing.

“Counsel for the Judge, upon the hearing on March 16th and 17th, 1916, of applications to the Circuit Court of Appeals, for the Ninth Circuit, for writs of prohibition and mandate, intended to prevent the Judge’s taking in this cause said proceedings against the Denver Company and to compel the entry of a proper decree of foreclosure and sale, which applications were made by the Trust Company, clearly intimated in argument, as I am informed by counsel for the Trust Company there present, that the Trustee

could not be trusted, in the opinion of the Judge, to act fairly and impartially in protecting the interests of said minority bondholders, as well as the interests of the majority bondholders.

“V.

“The bondholders who have joined in the formation of the Reorganization Committee and the Trustee have been advised by their respective independent counsel, and are of the opinion, that the obligations under Contract B of The Denver Company to the Trustee and the bondholders, in respect to the making of interest and sinking fund payments, are not subject to said First Mortgage, and in this suit for the foreclosure thereof no decree is sought for the sale or other disposition of said last-mentioned obligations. It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization, and shall be improved and operated for their benefit as stockholders of a new corporation, to be formed for the purpose. It is also their desire and intention, if so permitted, that the said claim against the Denver Company shall survive in the hands of the Trust Company, as Trustee under Contract B, in order that such new corporation may, if possible, by negotiations with the Denver Company, realize therefrom, so far as such claim pertains to the bonds of said majority bondholders, the greatest possible advan-

tage to said new corporation and its stockholders (now said bondholders), it being the purpose of the majority bondholders to pursue the prosecution of said claim against the Denver Company, so far as it pertains to their said bonds, only in event that it shall prove impossible by means of negotiation to make a thoroughly satisfactory settlement thereof in the interest of such bondholders; but otherwise to insist upon the enforcement of the same. The majority bondholders believe, and the Trustee agrees, that the prosecution of said claim in court will almost certainly result in the insolvency and the appointment of receivers for the Denver Company, and that in consequence the entire benefit of said claim will be lost, unless the bondholders are prepared to protect themselves in the course of a reorganization of the Denver Company.

“VI.

“As a consequence of the foregoing consideration, the Trustee, acting as Trustee of the trust created by said Contract B, as it was advised that it was its right and duty to do, at the request of the majority bondholders (represented by a protective committee, which was the predecessor of the Reorganization Committee, as the representative of a majority in amount of said bonds, and was composed of the same individuals), in May, 1915, filed in the United States District Court, for the Southern District of New York, a bill in equity, denominated as a bill ancillary to the bill of complaint in said cause pending in this court, and procured the appointment as Receivers of the Railway Company in said District the same

persons who had been appointed Receivers thereof in this Northern District of California, and thereupon filed in said United States District Court, for the Southern District of New York, a so-called dependent bill, whereby the Trust Company sought as ultimate relief the enforcement of the said obligations of the Denver Company to all of said bondholders, but incidentally and primarily the enjoining of individual bondholders, whose bonds, or some of them, bore direct guaranties of interest payments endorsed thereon by the Denver Company, from enforcing said direct guaranties, inasmuch as the result of such enforcement would be to impair or impede the enforcement of the obligations of Contract B which run in favor of all holders of said Western Pacific First Mortgage bonds. (Such direct guaranties are endorsed upon only a portion of said bonds.) Upon the institution of said suit in New York, said Judge displayed resentment at the Trust Company's action in commencing the same without his permission. At the same time both said Receiver, Frank G. Drumm, and said counsel for said Receivers, John S. Partridge, were greatly disturbed, and stated, in substance, that they felt affronted by the action of the Trust Company, and expressly stated, in substance, that the action of said Trust Company was an affront to said Judge, and to themselves. Upon an application made shortly thereafter by said Receivers for instructions as to whether they should institute suit for the enforcement of the Denver Company's said obligations, said Judge of his own motion issued an order, directed to the Trust Company, to show cause

why it should not be enjoined from prosecuting or taking other proceedings in said suit pending in New York. And subsequently said Judge rendered an opinion, and of his own motion caused to be entered an order enjoining the Trust Company from taking any further proceedings in said cause, and likewise, although no application therefor had been made by anybody, enjoining the Trust Company from prosecuting said obligations of the Denver Company in any court save in the court of said Judge, or taking any action with respect to said obligations of the Denver Company, or which might affect the same, without the permission of said Court, that is to say, of said Judge. Subsequently, and upon the hearing of an appeal from said order taken by the Trust Company to the Circuit Court of Appeals for the Ninth Circuit and of said applications for writs of prohibition and *mandamus* above mentioned, said Judge, through his counsel, filed motions to dismiss all of the same, and demurrers to the petitions for such writs, and returns to the alternative writs, and thereby alleged and claimed that said proceeding to enjoin the Trust Company as above stated was in reality a proceeding in contempt, and that said Trust Company had been in contempt of said Judge and his said court, and has in effect, by the order of said Judge, been adjudged so to be in contempt. And said Judge and his said counsel have clearly intimated in connection with said proceedings for injunction, and for said writs of prohibition and *mandamus*, that said Judge and his said Receivers and counsel believe that the

Trust Company instituted said New York suit for the purpose of evading the jurisdiction of the Judge, and that the Trust Company and the majority bondholders are unwilling to confide their interests under said contract to the decision of said Judge, and I am informed by counsel for the Trust Company, and by counsel for the Reorganization Committee, who are familiar with the situation and circumstances, and I verily believe, that said Judge suspects and resents the conduct of the Trust Company in instituting said New York suit. Both said Judge and counsel for the Receivers have, on several occasions, reiterated and emphasized the complaint that the Trust Company instituted said ancillary suit and filed said dependent bill, and obtained the appointment of said Warren Olney, Jr., and Frank G. Drumm as Receivers under said ancillary bill, without the permission of said Judge, and without any authority from him so to do, although the fact is that it is not necessary nor customary in such circumstances to obtain the permission of the Judge of primary jurisdiction for the institution of suits in ancillary jurisdictions or for proceedings thereunder, and that in point of fact no umbrage was taken by said Judge on account of the ancillary proceedings and appointment of Receivers in the District of Utah, in the Eighth Circuit, which have been actually instituted without such permission for the foreclosure of said mortgage.

“VII.

“In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge, if he were permitted to pass upon the matter

would have to determine and fix the up-set price to be named in said decree, that is to say the minimum amount for which the mortgaged property may be sold under such decree, which said up-set price, if the amount for which the property is in fact sold shall not be higher by reason of competitive bidding, will determine the amount of the distributive shares of holders of said Western Pacific First Mortgage bonds and therefore, if the property be purchased by or at the instance of the Reorganization Committee for the benefit of the majority bondholders, the amount which the majority bondholders shall be compelled to pay to each of the minority bondholders for his or her interest in the mortgaged property; such bondholder, however, retaining his or her claim against the Denver Company under Contract B for the interest already accrued, unpaid and unprovided for and for the interest and sinking fund payable upon the portion of the bond principal not paid through the application of the proceeds of such sale. Inasmuch as the Denver Company's obligation under Contract B is only to make up deficits in interest payments and sinking fund payments of only \$50,000 per year, it is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements

of value and all qualifying factors being considered—no more and no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders.

“On June 29, 1915, upon the argument of the question whether the prosecution of said New York suit by the Trust Company should be enjoined, raised upon an order to show cause issued at the instance of said Judge, the following statement was made by said Judge as shown by the reporter’s transcript of said proceedings. (The statement refers to Western Pacific First Mortgage Bonds.)

“ ‘The COURT.—I got five of them myself soon after they were issued, in 1910 I think. I paid ninety-five for them, I think. I am mistaken about the price I paid. I think I paid par for five of them and when I sold them I sold them for ninety-five. I had occasion to sell a couple of them soon after I bought them for ninety-five and the others I gave to Mrs. Van Fleet and I think she got a very little for them.

“As shown by the income tax certificates then in the possession of the Trust Company as Trustee under said Mortgage, various members of the immediate family of said Judge, being the wife and children of said Judge, and being also members of his household, were, from the 1st day of March, 1914, until after the 1st day of September, 1914, severally owners in various amounts of First Mortgage bonds of Western Pacific Railway Company, amounting in

the aggregate to approximately nine thousand (\$9,000) dollars principal amount”—

The COURT.—When was the bill filed?

Mr. HOW.—The 2d of March, 1915.

The COURT.—I knew they had disposed of them before that date; I thought that this ran into the period.

Mr. HOW.—(Continuing.) “—and a sister-in-law of said Judge, who is a member of his household, was at the same time the owner of First Mortgage bonds of said Railway Company in the principal amount of three thousand (\$3,000) dollars. I am credibly informed, and on such information state, that said bonds, three whereof seem to be the bonds mentioned by said Judge as aforesaid, were purchased by or for the persons so owning the same several years prior to said year 1914, and all thereof in or about the year 1910, and until the same were disposed of, as hereinafter stated, were owned by them. The market price of said bonds, as shown by a certain petition of said Savings Union, verified by John S. Drum, hereinafter mentioned, during the years 1910 to 1915, inclusive, were as follows: 1910: maximum 96, minimum 92; 1911: maximum 94, minimum 87; 1912: maximum 87, minimum 81; 1913: maximum 86, minimum 74; 1914: maximum 72, minimum 35; 1915: (prevailing price) January 36, February 32.

“The market price of said bonds on March 1, 1914, was approximately 68.

“I am credibly informed that all of said bonds, except said bonds belonging to the sister-in-law of said

Judge, were disposed of by or for their said owners late in the month of February, 1915, approximately one week prior to the commencement of this cause, at which time it was a matter of common knowledge that this cause was about to be commenced in this, the court of said Judge. As I am informed that the market price of said bonds at the time of said sale was approximately 33, the loss suffered by the owners of said bonds through the purchase and disposition thereof as aforesaid must necessarily have amounted to several thousand dollars. I have no positive knowledge that said bonds of the said sister-in-law of said Judge have not been disposed of by her, but I have made inquiry concerning said matters, and have been unable to ascertain that the same have been disposed of, and upon the contrary, I am informed and believe that his said sister-in-law was the owner of said bonds subsequently to the promulgation of the above-mentioned Plan of Reorganization, which was not adopted until after December 15, 1915, and that she has not deposited the same under said Plan.

“VIII.

“Said Railway Company never in any year made net earnings sufficient to pay as much as one-half of the amount due as interest upon its said First Mortgage Bonds, or to pay any of the amount payable into the sinking fund therefor. Said bonds were sold to the public largely upon the faith of the obligation assumed by the Denver Company in said Contract B to make said interest and sinking fund payments. Said bonds came into default, and the

foreclosure of said First Mortgage became necessary, because the Denver Company ceased, in March, 1915, to pay the interest upon said bonds, or to make up the deficit in interest payments thereon, although previously it had made up all such deficits. As a consequence, holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds.

“Upon the argument of said applications for writs of prohibition and *mandamus* above mentioned, counsel for said Judge, by innuendo, plainly intimated, as I am informed by counsel for the Trust Company there present, that the Trust Company (because opposed to bringing about unnecessarily a receivership of the Denver Company) was and is in collusion with the Denver Company to prevent the enforcement, or the full enforcement, of the obligation of the Denver Company with respect to said interest and sinking fund payments, and one of the counsel for said Judge in arguing said matter, and addressing the United States Circuit Court of Appeals, for the Ninth Circuit, in behalf of said Judge, said:

“ ‘When the first day of March passed, the Denver & Rio Grande owed a million and a quarter dollars in respect of its guaranty to pay that coupon interest, the date preceding the filing of the bill here involved. There was no idea of asking it to pay. It is a going concern. We have been told that if we

are ruthless we will drive it into bankruptcy. Well, if I owned any of the Western Pacific bonds which had been palmed off on me by the Denver & Rio Grande, and I couldn't get my money back, I would say, "Well, considering that I have been robbed of my money, I think the best thing that can happen to you is to be thrown into bankruptcy, so that you won't do it to anybody else another time." " "

The COURT.—Does it say I said that?

Mr. HOW.—No, your Honor, that counsel for your Honor said that in argument.

The COURT.—I was wondering where I said that, although taken in connection with other matters stated in the affidavit, I would not be surprised if he had stated that I did say that.

Mr. HOW.—(Continuing.)

“IX.

“Upon the rendition by said Judge of his opinion directing the entry of an order enjoining the prosecution by the Trust Company of said New York suit, said Judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company be made parties to this cause, and intimated in said opinion that the obligations of the Denver Company to the Western Pacific bondholders under Contract B should be ascertained in this cause. Subsequently, on March 6, 1916, in connection with the application for the entry of a decree in this cause above mentioned, said Judge, in the course of a colloquy with counsel, stated, or plainly implied, that in his opinion the Denver Company should, if possible, be compelled to appear as a party in this cause

and its said obligations be ascertained and if possible enforced. I quote, from said colloquy as follows:

“ ‘The COURT.— * * * I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshalling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never be necessary to sell the property of the Western Pacific.

“ ‘Mr. HOW.—That protection has not been afforded; if it had been, the mortgage of the Western Pacific would not have gone in default.

“ ‘The COURT.—That does not answer the question. The question is what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations. * * *

“ ‘The COURT.—But the Court is bound itself to realize on the security that is submitted to its charge. It cannot turn over to anybody the obligation which rests upon it to marshal these assets.’

“X.

“Said Judge, at the time of the appointment of receivers in this cause, was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr. as Receiver of the defendant Railway Company, but said Judge, of his own motion, and in order, as he explained, to have as Receiver some one with whom he was well acquainted, and in whom he had personal confidence, appointed also Frank G. Drum as a Receiver with Warren Olney, Jr., and thereafter, although it was represented to him by said Warren Olney, Jr. upon behalf of said Receivers that the then existing legal department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to the receivership, appointed John S. Partridge counsel to the Receivers, stating, in effect, that he wished in that position a person with whom he was personally acquainted, and upon whom he could implicitly rely. As I am informed by counsel with whom I have consulted on this matter, said Judge had formerly been a partner in the firm of which said Partridge is a member, and the son of said Judge was at the time of such appointment, and still is, an attorney employed by and associated with said Partridge in his private practice.

“On the hearing on March 6, 1916 of said application for a decree of sale, which would necessarily have been for the benefit of all of the said bondholders (there being then no creditors claiming any preference over or claiming to share equally with said bondholders, except two creditors, who consented to

such decree), said Judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon said application without hearing counsel for the Receivers, and made the following statement:

“‘The COURT.— * * * the Court is responsible for the administration of this property. Its avenue of aid and of enlightenment, is not only counsel for the respective parties, but the counsel for the Receivers and the Receivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. * * *

“‘I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right.’

“‘Upon the hearing of the return to said order to show cause why the prosecution of said New York suit should not be enjoined, said John S. Partridge, appearing in support of the order *nisi* which had been entered by said Judge upon his own motion, argued not only that the Denver Company should be made a party defendant to this cause, but that its said obligations could be ascertained and enforced in this cause, and that an equitable lien upon its property could be declared and enforced therein, and that, if

necessary, said First Mortgage of the Railway Company could be foreclosed as a mortgage in equity upon all of the property of the Denver Company.

“Upon said application for decree on March 6, 1916, said John S. Partridge, appearing as counsel for said Receivers, in consequence of the insistence of said Judge that he should and would require the views of said Receivers and their said counsel as to the granting or denial of said application, opposed the entry of a decree until the obligation of the Denver Company should have been adjudicated and if possible enforced.

“XI.

“On said 6th day of March, 1916, after the application for said decree, said Judge adjourned the hearing of said application until two o'clock in the afternoon of said day, for the purpose of hearing counsel for the Receivers as aforesaid, and upon the hearing of said matter later in said day, said Savings Union applied for leave to be heard concerning the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, Courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause. Thereafter said Judge continued said matter for one week, in order, as he stated, to enable said Receivers to present affidavits in connection with the same, and thereafter said Savings Union presented a petition for leave to intervene as a party to said cause, and to prosecute the same and participate therein as above stated, and in said complaint of intervention, and as ground for its applica-

tion for leave to intervene, charged, in substance, that said Reorganization Committee is controlled by the firms of Blair & Co., William Salomon & Co., and William A. Read & Co. (bankers in the city of New York); that the Trust Company is controlled by the Reorganization Committee; that said firms of bankers last mentioned had caused the Denver Company to default in the performance of its said obligations; had caused this foreclosure suit to be instituted; had caused said New York suit to be commenced,—”

The COURT.—Does it say the Court stated that?

Mr. HOW.—No. It says that is the ground of the claim of the Savings Union Bank & Trust Company for leave to intervene, as set forth in its petition for intervention.

The COURT.—Oh, yes.

Mr. HOW.—(Continuing.) “—and had taken all said proceedings for the purpose of enabling the Denver Company to escape the performance of its obligations to Western Pacific bondholders under Contract B, and for the purpose of defeating any claim that might be made that the claims of the Western Pacific bondholders under Contract B constituted an equitable lien upon the property of the Denver Company in priority to the liens of said Company’s First and Refunding Mortgage, and said Company’s Adjustment Mortgage; that said firm of bankers were interested, directly or indirectly, in the bonds of the Denver Company secured by said First and Refunding Mortgage and said Adjustment Mortgage, and entertained the purpose of protecting said bonds as against the interests of Western Pacific

bondholders represented by the Reorganization Committee and the Trust Company; and that the Reorganization Committee and the Trust Company are betraying the interests of their respective *cestuis que trustent*.

“Upon the hearing of said applications for writs of prohibition and *mandamus* in the United States Circuit Court of Appeals, counsel for said Judge argued that one reason why said Judge should not be compelled to enter a decree of foreclosure and sale in this cause is that said application of the Savings Union for leave to intervene and file said complaint had been made, and the clear implication of said argument was that said application ought to be and would be granted by said Judge and so granted because the Trust Company had shown unfairness and partiality in the administration of its trust, and did not and could not properly represent the minority bondholders in the prosecution of this cause. In the defense of said applications for writs of prohibition and *mandamus*, and in the argument thereof, counsel for said Savings Union, and counsel for said Judge, co-operated, and despite the fact that said charges of fraudulent conspiracy made in said proposed complaint in intervention were repeated in open court by counsel for said Savings Union, in the presence of counsel for said Judge, said statements were in no way repudiated by counsel for said Judge, or doubt concerning the same expressed, but, upon the contrary, the attitude of counsel for said Judge upon said hearing was one acquiescence in and of endeavor to support said charges.

XII.

Said applications for writs of prohibition and *mandamus* were heard in connection with an appeal taken by the Trust Company from the order of this Court, entered upon the opinion of said Judge, enjoining the Trust Company from prosecuting said New York suit, and directing the bringing as parties defendant of the Denver Company and said Missouri Pacific Railway Company. Said Receivers not being parties to said cause were not cited to appear as appellees upon said appeal, and, although the hearing of said appeal in connection with the application for said writs of prohibition and *mandamus* was consented to by all of the parties to said cause, the same was not consented to by said Receivers. Upon the contrary, at the time that the Trust Company was about to take its said appeal from the order of said Judge enjoining the prosecution of said New York suit, counsel for the Trust Company applied to said John S. Partridge, as counsel for said Receivers, to join all of the said parties to this cause in waiving the issuance of citation upon said appeal, and in stipulating that said cause might be heard on March 16, 1916, together with the applications for said writs of prohibition and *mandamus*; but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said Receivers and for said Judge, he had decided that it would not be advisable to enter into such stipulation, and refused so to do. Prior to the hearing of said appeal and said applications, said Judge entered

ex parte an order in this cause, directing counsel for said Receivers to appear upon said appeal, and to oppose the same, the body of which said order reads as follows:

“It appearing that the Equitable Trust Company of New York, plaintiff in the above-entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

WM. C. VAN FLEET,
United States District Judge.”

Although none of the parties to said cause objected to the hearing of said appeal or to the reversal of said order for injunction, said counsel for said receivers, acting in real substance, as counsel for said Judge appeared upon the hearing thereof and moved to dismiss said appeal and argued in support of said order.

And said Judge authorized counsel for the Receivers, and Garret W. McEnerney, Esq., a member of the San Francisco bar, to represent him in opposition to said applications for said writs of prohibition and *mandamus*, although said applications were not opposed by any of the parties to said cause.

Upon the hearing of said appeal and said applications, said counsel moved to dismiss said appeal upon the ground that the Receivers had not been made parties thereto or cited to appear thereon, and opposed the consideration of said appeal, upon the ground that the Court had not jurisdiction to review said injunctive order, because, as said Judge contended, said order constituted discipline for contempt and was not an injunction in the proper sense of that term, and opposed the consideration of said applications for said writs of prohibition and *mandamus*, upon the ground that the United States Circuit Court of Appeals had not jurisdiction to entertain the same, in all said matters indicating the plain intention of said Judge (notwithstanding a desire previously expressed by him, and which should have been entertained by him to obtain the judgment of said United States Circuit Court of Appeals concerning his jurisdiction to initiate and adjudicate herein said controversy concerning said claims against the Denver Company and to postpone a decree in this said cause until such controversy had been adjudicated), to prevent the expression of the judgment of said Circuit Court of Appeals upon said questions and to proceed with said cause irrespective of the propriety or impropriety of the course which he had determined to adopt with reference to said matters.

Upon consideration of the facts as I have learned the same from an examination of the records in this cause, and in said Circuit Court of Appeals, and of the facts outside said records above stated, I am

convinced and believe that said Judge is determined, if there be any way available to him so to do, to compel the prosecution of said claims against the Denver Company before him in this cause, and that he entertains a deep resentment against said Denver Company, and that he believes (although, as I verily believe, there is no foundation whatsoever for the belief), that said banking houses above named have conspired, as is charged by said Savings Union, to protect the Denver Company and the holders of certain of its bonds, against the claims of Western Pacific bondholders, at least in some part, and that said Reorganization Committee and the Trust Company are co-operating with them in so doing and that the Trust Company intends (although such is not its intention) to endeavor to secure an unduly low up-set price to be fixed by the decree herein, that said Judge has acquired and entertains a personal bias and prejudice against it on account of said matters and things, as well as the other matters and things hereinabove recited.

XIII.

Said Plan of Reorganization was adopted by said Reorganization Committee on December 17, 1915. A copy of said Plan and the Agreement annexed thereto was delivered by one of the counsel for the Reorganization Committee to said Judge, and a copy thereof to each of said Receivers, on or prior to December 24, 1915. Immediately thereafter, formal notices of the adoption of said Plan were published in various newspapers in the State of California, and lengthy summaries thereof and comments

thereon were published in most of the principal newspapers of said State, and particularly in the daily papers of San Francisco. Letters and notices were mailed by the Reorganization Committee to every bondholder whose name appeared upon the income tax certificate lists in the possession of the Trust Company, urging deposits of bonds under said Plan of Reorganization, and inasmuch as the names of the members of the family and household of said Judge who were holders of said bonds prior to the sale thereof in February, 1915, hereinabove mentioned, do appear upon said list, undoubtedly said circular letters were received by various members of the family and household of said Judge, and inasmuch as the said sister-in-law of said Judge was a holder of some of said bonds after the date of the promulgation of said Plan, and unquestionably received said circular letters, and a copy of said Plan was in the possession of said Judge, a knowledge of the contents of said Plan must necessarily have been acquired by said Judge.

Notice that the time for withdrawal of bonds deposited with the Protective Committee, which was the predecessor of said Reorganization Committee in representation of said bondholders, would expire six weeks from the date of the first publication of said Plan, to wit, on February 4, 1916, also was duly published as aforesaid, and notice that the time for deposits thereunder would expire on February 7, 1916, was so published, and was contained in said Plan. Immediately after said last-mentioned date the fact that a very large majority of said bonds,

to wit, about \$43,000,000, had become subject to said Plan and Agreement of Reorganization, was published throughout the United States, and particularly in the city and county of San Francisco. The fact also that the financial requirements of said Plan, amounting to \$18,000,000 in cash, had been fully underwritten, and money necessary for the carrying out of said Plan, and particularly for the extension of the lines of Western Pacific Railway Company in the State of California, and for the rehabilitation and betterment of its existing lines had been provided, was also so published, and was a matter of common knowledge. It also appeared by reference to said Plan, and the fact was published generally in the papers of the city and county of San Francisco, and was a matter of common knowledge, that if said Plan was to be carried into execution it would be necessary that the same be declared operative by said Reorganization Committee before March 15, 1916, and that if it should not be declared operative before said date it would cease to be binding upon the depositors thereunder and all such depositors would be at liberty to withdraw their bonds therefrom and said Plan would fail.

During the period which elapsed between December 24, 1915, and February 21, 1916, neither the Trust Company, nor any of the counsel for the Trust Company or said Reorganization Committee, nor anyone connected with any thereof, so far as I have been able to ascertain, ever was apprised in any manner that there was, or would be, any active opposition to the carrying out of said Plan. It was a matter

of common and necessary knowledge that a prerequisite to carrying out the same was the entry of a decree of foreclosure and sale in this said cause, and there was never, as I am informed and believe, any intimation during said interval that there would be any objection upon the part either of said Judge or of said Receivers, or of counsel for said Receivers, to the entry of such decree of foreclosure and sale.

Said Plan of Reorganization contemplate the sale under the decree of foreclosure and sale to be entered in this said cause of the rights of Western Pacific Railway Company as such under said Contract B, that is to say, rights under the traffic and trackage provisions of said Contract B, in *connection* said railway's other property, but does not require or contemplate in any contingency the sale of any of the rights of the holders of the bonds of said company, either with respect to interest payments or sinking fund payments at any such sale, or in this cause at all, and I am advised by counsel for the Trust Company and said Reorganization Committee that there is no reason whatsoever, if said Judge were willing to direct such course to be pursued, that the said rights of Western Pacific Railway Company, whatsoever the same may be, should not be so disposed of (the rights of said bondholders surviving), and that in such event no bondholder will be prevented from causing his own claims to be enforced thereafter by the Trust Company, as Trustee, under said Contract B, and that if said Judge is of the opinion that the claims of said bondholders against said Denver Company should be ascertained by him, or

even enforced in this cause, proceedings to that end, if they be warranted at all, may be taken as well after decree of foreclosure and sale as before such decree.

Nevertheless, on February 21, 1916, said Judge, without allowing any party to this cause any opportunity to be heard concerning the desirability or consequence of such action upon the execution of said Plan of Reorganization, and notwithstanding that the prosecution of said New York suit had already been and then was stayed by a restraining order issued by said Judge at his own instance, and that said Judge had been advised by the petition of one S. C. Wright filed herein and on the same day denied by said Judge, of the Purpose of the Trust Company to apply for a decree of sale herein in advance of any attempt to enforce the claims of bondholders against the Denver Company under Contract B, delivered an opinion in the proceeding to enjoin the Trust Company from proceeding with said New York suit, wherein he directed an order to be entered enjoining said suit, and that said Denver Company and Missouri Pacific Railway Company be made parties defendant to this cause, and indicated his opinion that the obligations of said Denver Company to said bondholders under Contract B must be ascertained, and possibly enforced in this cause. In a colloquy between counsel for the Reorganization Committee and the Judge, there was also an intimation, although not very distinct, that said Judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure

and sale to be entered therein.

At the time the opinion of said Judge was handed down, one of the counsel for the Reorganization Committee suggested to said Judge that the effect of the entry of the order directed in said decision so far as it would initiate new proceedings and would require new parties to be brought in, might be to interfere very seriously with the carrying out of said Plan of Reorganization, and would jeopardize the success of the same, and requested said Judge to delay the entry of that portion of said order until a hearing could be had, and a showing made to him, of the interest of the bondholders as a whole to have said Plan carried out and of the effect upon the success thereof of the order which said Judge proposed to enter. Said Judge, however, peremptorily refused to delay the entry of said order, or any part thereof, and directed the same to be entered, and directed counsel for said Receivers to cause the same to be served upon the said Denver Company and said Missouri Pacific Railway Company, and said companies to be brought into said cause as parties defendant thereto.

Subsequently, and in order that, if possible, an early decree of foreclosure and sale might be had in the said cause, as was absolutely requisite to the execution of said Plan of Reorganization, and in order that the parties in interest might be advised, as it was essential that they should be, whether said Judge would in fact permit a decree of foreclosure and sale to be entered with reasonable promptness, counsel for the Trust Company prepared and, as

hereinbefore stated, on March 6, 1916, caused to be presented to said Judge in open court a form of decree of foreclosure and sale, which said counsel had previously presented to all of the other parties to this cause, and to the only creditors claiming preferences therein, who, without exception, had consented and stipulated to the prompt entry thereof. Upon the hearing upon said application said Judge refused to enter said decree, stating, in effect, that until the United States Circuit Court of Appeals of the Ninth Circuit had disposed of said application for a writ of prohibition, which had been made between February and March 6, 1916, he would not pass upon the application for decree, and, in effect, that if his jurisdiction to adjudicate said claims against the Denver Company in this said cause was not denied by the Circuit Court of Appeals after hearing said application, he would not direct the entry of any decree until the matters of the bondholders' claim against said Denver Company should be disposed of by him. At the same time, said Judge, although requested so to do, refused either to direct the entry of said decree, or to deny the application for the entry thereof, although the suggestion that an order denying said application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals on a proceeding for *mandamus*. Said Judge manifestly intended to prevent such review, and the expression of the views of said Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

From a consideration of the facts aforesaid, and also of the proceedings which have been taken, as stated elsewhere in this affidavit, to prevent the rendition of any judgment by the Circuit Court of Appeals preventing said Judge from carrying out his purpose to compel a litigation of said matters with said Denver Company in this court and cause, and compelling said Judge to enter a proper decree of foreclosure and sale herein, I am convinced that said Judge rendered said decision, and refused to permit the entry of said decree in the full belief that his said action would probably defeat the carrying out of said Plan of Reorganization and with the desire that such should be the result thereof, and that said Judge is personally opposed to said Plan of Reorganization, and is determined to defeat the same.

As in this affidavit above stated, said Judge is aware that the Trust Company, as in duty bound, has co-operated, in various proper ways, with said Reorganization Committee in the endeavor to carry out said Plan of Reorganization, and identifies said Trust Company with said Reorganization Committee, and believes that it is a partisan of said Plan, and of the bondholders who have joined therein, and I verily believe he has a personal prejudice against the Trust Company by reason, among other things, of its said co-operation with the Reorganization Committee in the endeavor to carry out said Plan of Reorganization.

XIV.

At various times during the administration of the receivership in this cause, as I am informed by coun-

sel for the Trust Company, counsel for the Receivers have submitted to the Court applications for orders authorizing the Receivers to adopt contracts, leases, or other arrangements, made by the Railway Company with third parties, and also applications for orders authorizing the Receivers to enter into contracts, leases, or other arrangements with third parties, for or in connection with the use of property. Upon said applications counsel for complainant, who has appeared thereon, has frequently objected to the making of any such order if the same purported to operate, or if the same could operate by their own force, beyond the period of the receivership. When such objections were originally made by counsel, said John S. Partridge, as counsel for the Receivers, took the position that said orders could, would and should so operate, but said Judge, after considering the question, stated that, in his opinion, the proper construction of said orders should be that they would not operate except during the period of the Court's control of the property through its Receivers, unless they should expressly provide to the contrary. Counsel for the complainant requested the Court either to incorporate such statement in each order, or to enter a standing order directing that such construction should be given to every such order in absence of a contrary declaration in the order itself. Said Judge, notwithstanding the fact that he had expressed the view above stated with respect to the proper construction of such orders and that said John S. Partridge had previously expressed a contrary view and that said orders did not by their terms contain any limitation,

stated that he would incorporate such statements in said orders, or make such standing orders, if, but not unless, said John S. Partridge as such counsel would consent thereto.

Shortly after said Judge, upon his own motion, directed the issuance of an order in this cause restraining the Trust Company from prosecuting said New York suit, pending decision upon the order to show cause why an injunction should not issue, counsel for the Reorganization Committee called upon said Judge at his chambers, and represented to said Judge that the primary object of maintaining said bill in New York was to obtain an injunction restraining the prosecution of suits against the Denver Company by individual bondholders suing upon direct guaranties, to the detriment of all other bondholders, and that the restraining order made in this proceeding was so broad that even this limited object could not be accomplished and said counsel suggested to the Judge that it was to the best interests of the bondholders as a whole so to modify the restraining order as to permit proceedings to be taken in the New York jurisdiction, for the sole purpose of obtaining injunctions against such suits by individual bondholders against the Denver Company which might create preferences or otherwise result in embarrassment to the bondholders as a whole, and counsel stated that the modification of the restraining order so as to permit injunctions to be issued against individual bondholders would further that end. The said Judge, nevertheless, stated that he would not make any order modifying the restraining order in any manner, unless such modification were con-

sented to by counsel for the Receivers, but also stated that if such modification were so consented to, the same would be made.

XV.

By reason of the facts above stated with respect to and connected with the appointment of said Frank G. Drumm as one of the Receivers of Western Pacific Railway Company, and the appointment of said John S. Partridge as counsel for said Receivers, and the action of said Judge in instituting, and of said Partridge in prosecuting, said injunction proceedings to restrain the prosecution of said New York suit, and the suggestion by said Partridge in argument of proceedings for bringing in the Denver Company as a party defendant in this cause, and the action of said Judge, of his own motion, in directing the same, and the declared purpose of both said Judge and said Partridge to compel an adjudication upon said claims against said Denver Company before the entry of decree herein, and the expressions of said Judge, hereinabove related, with respect to relying upon said Receivers and said counsel, and looking to them for information and guidance, and the action of said Judge, hereinabove related, in confiding the defense of said applications for writs of prohibition and *mandamus* to counsel for said Receivers, and particularly said John S. Partridge, and in directing said counsel to oppose the consideration of said appeal, and in permitting his said counsel to co-operate upon the hearing of said applications for writs of prohibition and *mandamus* with said Savings Union and its counsel, and

of the action of said Judge in submitting his judgment to, and following the wishes of, said John S. Partridge as counsel for said Receivers in said matters last above mentioned, I am led to believe, and do believe, that said Judge has a personal bias and prejudice in favor of said Receivers and their said counsel, as well as against the Trust Company.

XVI.

The complaint in intervention of said Savings Union was made and presented to the Court at the instance of John S. Drum, Esq., who is the president of said Savings Union and a stockholder therein, and who verified said complaint. Said John S. Drum is the younger brother of Frank G. Drum, who, as above stated, is one of the Receivers of the Railway Company appointed by said Judge, and one of the especially trusted representatives and confidential advisers of said Judge.

The hearing of the said appeal from the injunction directed by said Judge against the prosecutions of said New York suit, and upon said application for writs of prohibition and *mandamus*, took place before the United States Circuit Court of Appeals, for the Ninth Circuit, sitting in the city and county of San Francisco. At the opening of court on Thursday, the 16th day of March, 1916, counsel for said Savings Union stated to the Court that in connection with the applications for the writs of prohibition and *mandamus* he appeared on behalf of said Savings Union, and asked leave to file a petition in opposition to the issuance of the writ of prohibition, and asked that it might be argued in connection with

the whole matter, and the fact that an application of the Savings Union for leave to intervene in this said cause had been made was referred to by counsel for said Judge as a ground of objection upon his part to the granting of the writ of prohibition, and more particularly the writ of *mandamus* then applied for in said United States Circuit Court of Appeals, and both said facts were referred to in said newspapers, and must necessarily have come to the knowledge of said Judge. On Friday, March 17, 1916, counsel for said Savings Union again appeared, co-operating and as if associated with counsel for said Judge, and argued at length in support of their said petition for leave to intervene, making various charges of fraud and bad faith against the Trust Company, and those with whom said counsel alleged the Trust Company had co-operated in respect to its actions as Trustee under said Mortgage and under said Contract B. No protest was made by said Judge, or his counsel, against this proceeding upon the part of said Savings Union, but counsel for said Judge, not only by so relying upon the existence of said application, but also by endeavoring in argument, as elsewhere stated herein to create the impression that said complaint in intervention and the charges of fraud made therein were justified, and by insinuating that said Judge might have acted as he did because he had inferred upon his own account the truth of the frauds so charged, by implication and innuendo supported such charges of fraud, and in effect said action of said Savings Union. Wherefore, I am led to believe, and do believe, and so

charge, that said Judge has a personal bias and prejudice in favor of said Savings Union.

XVII.

“This affidavit was not filed ten days before the beginning of the pending term of court of said United States District Court, for the Northern District of California, to wit, prior to March 6, 1916, for the following reasons:

“The plaintiff is a New York corporation, having its principal offices in the city of New York, where I reside, and having no branch offices or representatives in the city and county of San Francisco, or in the portion of the United States west of the city of New York; that none of the facts and things herein stated, other than the general course of the proceedings in said cause, the appointment of said Frank G. Drum as one of said Receivers, the appointment of said John S. Partridge as attorney for the said Receivers, and the rendition of the opinion of said Judge on February 21, 1916, and the fact that said Judge and counsel for said Receivers had apparently taken umbrage to some extent, on account of the prosecution of said New York suit without said Judge’s permission, were known to the Trust Company, or any of its officers or agents until after March 6, 1916; that, as I am informed by counsel for the Trust Company, Jared How, Esq., one of said counsel, resident in San Francisco, was familiar prior to March 6, 1916; with the matters above stated which had occurred prior to said day. He, nevertheless, believed, as he has informed me, that in spite thereof said Judge could not and would not refuse to enter a

proper decree in this cause whenever the same should be ready for decree, or if all of the parties thereto should stipulate for the entry of such decree, and that despite the fact that there was contained in the opinion of said Judge rendered on the 21st day of February, 1916, an intimation that he considered it necessary that the obligations of the Denver Company should be enforced in this cause, there was not then any clear intimation that he considered it essential that the same should be so enforced prior to the entry of decree of foreclosure and sale herein, and that said counsel believed that whenever an application for a decree, consented to by all parties to said cause, should be presented to said Judge, he would be bound to grant the same, whether or not he should determine to proceed in the cause with the prosecution of said claims against the Denver Company; and that it was not until after the refusal of said Judge to proceed to decree in said cause on March 6, 1916, that counsel for the Trust Company had any clear ground for the belief that the personal bias and prejudice of said Judge was influencing him and might continue to influence him in his conduct and decisions in said cause to the substantial and irreparable injury of the interests of the bondholders of the Railway Company and of the Trust Company as their Trustee; and it was not until after the complaint in intervention of the Savings Union had been filed in the District Court, and the charges of fraud and bad faith therein contained had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of

March, 1916, and had been acquiesced in, and apparently approved by counsel for said Hon. William C. Van Fleet (said counsel then and there collaborating with counsel for the proposed intervenor), as justifying the action taken by said Judge before any such charges were made, that any director, officer or agent of, or counsel for, the Trust Company became fully convinced that said Hon. William C. Van Fleet had a personal bias and prejudice against the complainant herein, which would cause him to persist in denying to the complainant the relief to which he is entitled in said cause and so seriously influence him therein as to make it the duty of the Trust Company to cause an affidavit of prejudice to be filed herein. Shortly after receiving information of the action of said Judge on said 6th day of March, 1916, from its counsel in San Francisco and forthwith upon receiving information that said Savings Union had on March 13, 1916, applied for leave to intervene in said cause and file herein its said complaint in intervention and of the character of said complaint and that the apparent purpose thereof and of said Judge was to postpone indefinitely the entry herein of a decree of foreclosure and sale and being requested so to do by the President and New York counsel of the Trust Company, on March 14, 1916, I left the city of New York and went directly to the city of San Francisco, arriving therein on the 18th day of March, 1916. I forthwith proceeded to interview various persons, and particularly the counsel for the Trust Company present in San Francisco, and the counsel for the Reorganization Committee present in said city, and

to examine the various papers and documents in this cause herein referred to, and by such inquiry and investigation familiarized myself with the facts and circumstances hereinabove set forth. As a result of such inquiries and investigation, I became satisfied that such personal bias and prejudice on the part of said Judge does exist and that it would be impossible by reason of the same for the complainant herein to obtain a fair consideration for and reasonably prompt enforcement of its rights and the rights of all said bondholders while said Judge should remain in control of said cause or the administration of said receivership herein and that it was necessary and the duty of the Trust Company to cause this affidavit to be filed herein. Nevertheless, I was advised by counsel for the Trust Company that, inasmuch as said applications for writs of prohibition and *mandamus* had been submitted to said Circuit Court of Appeals and at least the question of the power of said Judge to compel the litigation of said claims of said bondholders against the Denver Company and to postpone the entry of a decree herein until the conclusion of such litigation had been submitted thereupon to said Circuit Court of Appeals, it would not be proper to file this or any such affidavit, until after the decision thereon of said Circuit Court of Appeals should be rendered unless it should be necessary so to do in order to prevent said Judge from enacting in the meantime with respect to some one or more of said controverted matters hereinabove mentioned. On March 20, 1916, said Judge announced that he would not act in such matters until the decision of said Circuit Court of Appeals should be ren-

dered and thereupon I returned to the city of New York and reported the facts stated in this affidavit, and the other facts and opinions which I had gotten concerning the attitude and conduct of said Judge to the President and Executive Committee of the Trust Company. Thereafter and at the first meeting of said Executive Committee held after my return, to wit, on March 29, 1916, the Executive Committee considered my said report and also a resolution which on March 20th, 1916, had been adopted by said Reorganization Committee requesting the Trust Company so to do and thereupon adopted a resolution authorizing the execution of an affidavit of bias and prejudice in such form as should be approved by counsel for the Trust Company under my supervision, and requesting me to verify the same and cause the same to be filed not only as my individual act but upon behalf of the Trust Company and therein to insist that said Judge shall proceed no further in this said cause and otherwise as hereinbelow prayed. Accordingly I have, at this my earliest opportunity thereafter, verified this affidavit, which has been so approved by said counsel.

WHEREFORE, I individually, and on behalf and as the authorized officer of said complainant, the Equitable Trust Company of New York, do now and hereby pray and insist that said Judge, the Hon. William C. Van Fleet, shall proceed no further in this said cause, or in any matter arising therein, and that another Judge shall be designated therefor, in the manner by law prescribed, and that said Judge shall cause the fact of this affidavit and

application to be entered on the records of the Court, and also an order that an authenticated copy hereof shall be forthwith certified to the Senior Circuit Judge for the Ninth Circuit, then present in said Circuit; and for such further proceedings as are prescribed by law.

LYMAN RHOADES.

Subscribed and sworn to before me this 29th day of March, 1916.

[Notarial Seal]. MYLES M. BURKE,
Notary Public, New York County, No. 222, Register's Office No. 6148.

Term expires March 30, 1916.

I HEREBY CERTIFY that I am the counsel of record of the complainant in the above-entitled cause, The Equitable Trust Company of New York, as Trustee, and that I reside in the city of San Francisco, and am a member of the bar of the United States District Court, for the Northern District of California, and that I am familiar with the proceedings in said cause, and have read the affidavit of Lyman Rhoades, to which this certificate is appended, and that such affidavit and application are made in good faith.

JARED HOW,

Counsel of Record for said complainant, the Equitable Trust Company of New York."

Now, I suggest again to the Court the procedure under sections 21 and 20 of the Judicial Code, and I submit a form of an order certifying the fact of the filing of this affidavit and application.

The COURT.—Is it your view that *ipso facto* the

filing of this affidavit, without regard to the truth of the matters stated, disqualification ensues?

Mr. HOW.—I do think there can be no doubt as to the meaning of the Statute upon that, your Honor.

The COURT.—It has been construed by the Federal Courts otherwise.

Mr. HOW.—It has?

The COURT.—Yes. I think you will find in a note to the Judicial Code that the facts must be such as in their nature tend to show disqualification; but, Mr. How, very clearly I don't suppose that anyone would say that where an affidavit assails the Judge in a respect in which he is utterly unconscious of being at fault, and especially where it assails him with reference to personal matters dragged in for the purpose of embarrassing him in the administration of the case apparently he would be expected to sit silent and not answer the affidavit. I certainly have a right to place myself right before the public.

Mr. HOW.—I should assume, your Honor, that the right to answer the affidavit must be conceded but I should assume that the matter of the determination of the fact of disqualification would rest with the Circuit Judge—perhaps the Senior Circuit Judge.

The COURT.—I doubt that. I think it would have to rest with the Circuit Court of Appeals.

Mr. HOW.—The case of *Henry v. Spear*, 201 Fed. 869, is the only case I know of under this section of the statute.

The COURT.—You will find two or three cited in the note to those sections in the Judicial Code.

Mr. HOW.—The amendment I think is the amendment of 1913 as the code now stands, but for your Honor's assistance, and as this is very short, I will read the paragraph upon this point:

“Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the Judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.”

Mr. PARTRIDGE.—Where is that, Mr. How?

Mr. HOW.— 201 Federal 869.

The COURT.—I think, Mr. How, I certainly would be inclined to have the judgment of my own Circuit Court of Appeals upon the subject after a proper answer made to the matters which it is claimed tend to show prejudice.

Mr. HOW.—Your Honor, I have no further duty to perform and cannot be of any more assistance to the Court.

Mr. MADISON.—If your Honor please, the Savings Union Bank & Trust Company has up this morning an amended petition for leave to intervene here for the purpose of being made a party to the

record for the purpose of introducing evidence in order to aid the Court in arriving at an up-set price. As I understand it, the only point now before this Court at the present time, assuming that the Circuit Court of Appeals' opinion is final will be the signing of a decree and fixing an up-set price. The plaintiff in the case admits that there should be an up-set price fixed, and the affidavit so recites. All the parties to the case agree that there should be an up-set price—

Mr. HOW.—Don't claim that I am bound by any such statement as that. I don't admit it. I don't think it is a proper case for an up-set price, never have and shall not to the end. I think the Court has the power to fix an up-set price.

Mr. MADISON.—The proposed decree drawn up by Mr. How and submitted by Mr. How on behalf of the Equitable Trust Company contains a provision providing for an up-set price and simply leaving a blank for the amount to be filled in. Am I correct about that, Mr. How?

Mr. HOW.—Quite correct.

Mr. MADISON.—And at the time this matter was presented Mr. How said he thought it was a proper case for an up-set price. He had nothing to say however upon that point.

I think this is a case where an up-set price should be fixed and I would be glad to argue that point at the proper time. There is no objection, as I can see, to the form of the decree and nothing before the Court but the fixing of the up-set price.

This affidavit seems to me to be the most remark-

able that I, in my experience, have listened to. It states that it is the duty and it is the purpose of the Reorganization Committee to get the lowest possible price, to have this property sold for the lowest possible price, that it is in its interest to do so and it intends to do so—

Mr. HOW.—Mr. Madison, may I interrupt you a moment?

Mr. MADISON.—Yes.

Mr. HOW.—Your Honor, I feel it is my duty, not knowing just what counsel for this applicant is proceeding to, it is my duty to protest against this Court hearing any further proceedings of any character in this court.

The COURT.—Enter the protest of record, proceed, Mr. Madison.

Mr. MADISON.—The affidavit recites that it is the purpose, the desire and the intention of the Reorganization Committee to have this property sold at the lowest possible price; on the other hand, that it is in the interest and the desire of the dissenting bondholders who have not joined this Reorganization Committee to have it sold at the highest possible price. Therefore there is an irreconcilable conflict between the bondholders who have joined in this Reorganization Plan and those who have not. He says it is the duty of the Equitable Trust Company, which makes this affidavit, to stand aloof and that it is doing so and intends to do so. And yet in this case, if your Honor please, the record shows that the President of the Equitable Trust Company is the Chairman of the Reorganization

Committee; and the record in this case shows, if your Honor please, that the Vice-president of the Equitable Trust Company, the man who swears to this affidavit, is acting as the Secretary of the Reorganization Committee. Now, is there any question that if the President and the Vice-president of the Trust Company are acting as the Chairman and the Secretary of the Reorganization Committee, that they are acting together?

Now, as I say, we have before the Court an application for leave to intervene for the purpose of being made a party to the record in order that we may introduce proper evidence, that we may subpoena witnesses that we may be heard upon matters relating to the fixing of this up-set price.

The Trust Company has filed an answer here, in which it alleges that it intends to and will act in accordance with the wishes of the majority.

So the minority have nobody representing them before the Court.

I have a number of cases here and I would like to argue the question to the Court with respect to mortgage foreclosures of railroads but the only question I have in mind is whether the Court should act upon that matter while this other matter is pending.

The COURT.—The opinion of the Circuit Court of Appeals, as I read it in a more or less cursory way because I have not had a copy furnished me, contemplates that the minority bondholders may be heard on the question of an up-set price; they may appear here and introduce evidence as to value, and so forth. Does that render it necessary for that

purpose that they be allowed to intervene?

Mr. MADISON.—Yes, sir. I have authorities on that point. Not only that they have the right to intervene, if your Honor please, but that it is prejudicial error to refuse to make them parties to the record. I have cases under just such like circumstances.

The COURT.—It seems to me, Mr. Madison, it would not be proper for the Court to proceed at this time and make any order in the face of this affidavit challenging its authority to sit here by reason of bias and prejudice. I think the first thing should be that the Judge of the Court be given an opportunity to answer that affidavit.

Mr. MADISON.—I submit then that both matters stand over together.

The COURT.—Because I do not accede at all to the proposition that *ipso facto* upon the filing of such an affidavit the Court is absolutely powerless to protect itself against aspersion cast in as formal and solemn a way as by a written affidavit such as this: and certainly it does seem to me that if the Court were to permit itself to be driven from what it conceives to be its duty by such an attack without any response it would certainly be subject to the characterization of being cowardly; I don't think anybody has ever accused me of being that in the performance of my duty. I certainly shall undertake to answer any and all matters which are advanced here to refute the existence of a prejudice which I absolutely am unconscious of. Now, we are not always conscious of the workings of our own mental processes.

Sometimes we are actuated by things that we are not actually mentally conscious of; but certainly I am not aware of the existence upon my part of the slightest degree of feeling or prejudice which would preclude me from doing equal and exact justice between these parties. And I doubt seriously if counsel—any of the counsel engaged in this case that have taken views opposite to those expressed by this Court would willingly stand up and personally intimate that they believed the Court was actuated by prejudice. Very clearly it seems to me the mere action of the Court in passing upon the matters before it reaching a conclusion at variance with the views of counsel is not of a character upon which to predicate prejudice—I mean in and of themselves. I certainly expect to fully answer this affidavit and show, if I may, the absolute and entire absence of any sentiment, feeling or actuating motive that could in any wise be characterized as prejudice in this case. What this Court has done it has done with the single and the sole purpose of trying to perform its duty in such a way under the conception that that was its duty as to conserve the rights of everybody concerned in this property which has been submitted to its charge, and to so do it that no man could go forth to the world and say that his rights however insignificant as compared with those holding greater had not been fully protected by this Court. That has been the motive and the purpose of this Court. It does not propose to be driven from the execution of those duties which fall to it by reason of the place it holds unless it is found that the mere filing of

this affidavit without determining the question of whether or not it is sufficient in substance to disclose prejudice such as to preclude this Court from acting is of that fiat character as to disarm this Court of jurisdiction *ipso facto*.

Mr. MADISON.—I don't take it, if your Honor please, that anyone can have any doubt about those matters, or about your Honor's desire always in connection with this matter to protect the bondholders as a whole and not to act simply because a Reorganization Committee has requested action.

The COURT.—That affidavit purports to have been sworn to in New York but it has facts recited in it which must necessarily have been put into it here.

Mr. MADISON.—My point at the present time is simply that my application for leave to intervene may keep along with this other matter.

The COURT.—Oh, yes. I will put the matters over, including—do you want to be heard, Mr. Partridge?

Mr. PARTRIDGE.—Yes, if your Honor please, solely on the question of the method of procedure. Section 21 of the Judicial Code provides that not only must the party state the bias and prejudice of the Judge but he must set out the facts and the reasons for the belief that such bias or prejudice exists. This matter has just come up this morning. As usual these gentlemen did not even do me the courtesy of serving me with a copy or letting me know that the thing was going to break in this outrageous way; but as I understand the statute—

The COURT.—I can suggest to you that counsel sent it to my chambers for my private perusal but I refused to have it left there and directed that it be presented in open court.

Mr. HOW.—I received it only this morning and had no copy.

Mr. PARTRIDGE.—Well, Mr. How, it is not the first time—as long as we are on the subject. At any rate, it seems to me—without examining into it at all, it does seem that the filing of the affidavit will divest the Court of any jurisdiction to proceed any further until the questions involved in the affidavit are determined.

The COURT.—I should imagine that must be so.

Mr. PARTRIDGE.—Yes. However, this case cited by Mr. How points out conclusively that then the duty devolves upon the Judge of the court to determine from the terms of the affidavit itself whether or not the matters therein set forth are such as to constitute a personal bias and prejudice; and therefore if the Court finds that it is legally sufficient to constitute in his mind a bias and a personal bias against the complaining party the court then has nothing to do but to pass the matter up to the presiding Judge. Therefore it is clear even from that very meagre and skeleton diffusion that it is your Honor's duty to examine this affidavit and determine whether or not, taking it all to be true—and of course most of it is untrue, but taking it all to be true, whether or not it would constitute matters which would bias your Honor against the plaintiff or the complainant in this case.

Now, if your Honor please, as I understand it, the affidavit when you boil it all down and strip it of those portions of it which are venomous and stripping it of those portions of it which are manifestly on the face of the record untrue it comes down to this, that the evidence of bias and prejudice in your Honor's mind consists in the simple fact that you have endeavored to do your duty by construing the law and Contract B, as you found it. Now then, I may be wrong about that; as I say, I have just heard of this since I came into court this morning; but if that be so, then your Honor will determine that that affidavit does not constitute it a cause to send it to the presiding Judge under the statute. If you find that those matters are such that in their nature they might be construed to be prejudice in your Honor's mind then it would seem to me the question of meeting the outrageous allegations of that document are matters that should go to the presiding Judge. I therefore would suggest, if I may do so without again inviting a charge of undue zeal, that your Honor shall suspend all matters in consideration of this cause until you have examined that affidavit.

The COURT.—Well, that is the course I was about to suggest when you arose. I deem the filing of the affidavit sufficient to suspend the action of the court on the merits of any matter before it until it has had an opportunity to pass upon the sufficiency of that affidavit. When I have done so, should I conclude that it is unanswerable as tending to show bias and prejudice upon the part of this Court,

then of course the matter will be certified to the presiding Judge; if I deem that it is not of that character but such that it is not in its nature one to give rise to legal bias or prejudice—because that is what the statute deals with—then I shall certify the question to the presiding Judge to pass upon whether or not—is that the method to be followed, to the presiding Judge or to the Court?

Mr. HOW.—The Senior Circuit Judge now in the Circuit.

The COURT.—I imagine, Mr. How, that means an instance where the affidavit is found to be sufficient in substance to amount to a showing under the statute, and it would be only for the Circuit Judge a direction to some other Judge to take the matter up; isn't that right?

Mr. HOW.—The only decision that I know of is the one I read to your Honor. They speak there of its legal sufficiency but then the question whether a disqualification exists under the facts they say is not a matter for the Judge to determine.

The COURT.—I will let these pending matters stand over until say Wednesday morning and in the meantime I will advise myself as to the proper method and manner in which to answer the matters that have been set up in this affidavit.

(The further hearing of the matter was thereupon continued until Wednesday, April 5, 1916, at 10 A. M.)

Exhibit III [to Petition for Mandamus—Proceedings Had April 5, 1916, Re Motion to Disqualify, etc.].

In the District Court of the United States, for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. W. C. VAN FLEET, Judge.

THE EQUITABLE TRUST CO. OF NEW YORK
vs.

WESTERN PACIFIC RAILWAYCOMPANY et al.

Wednesday, April 5, 1916.

REPORTER'S TRANSCRIPT.

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In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. WM. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF NEW
YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY
et al.,

Defendants.

Wednesday, April 5th, 1916.

Counsel Appearing:

For the Equitable Trust Co. of New York, Trustee:
JARED HOW, Esq.

For the Central Trust Co.: T. A. THACHER, Esq.

For the Boca & Loyalton Railroad: Messrs. SLACK
& GOODRICH.

For the Savings Union Bank & Trust Company:
Messrs. PILLSBURY, MADISON & SUTRO.

For the Reorganization Committee: JOHN F.
BOWIE, Esq.

For the Receivers: JOHN S. PARTRIDGE, Esq.,
GARRETT W. McENERNEY, Esq.

Mr. McENERNEY.—In the application filed here on Monday, if your Honor please, under section 21 of the Judicial Code, your Honor has requested Mr. Partridge and me to appear here and lay before you such considerations respecting the law and facts as occur to us; as we were not able to get a copy of the affidavit until yesterday, and as I was not able to see it until this morning, we ask that the matter stand over until Friday, and as I am not able to be here in the forenoon, we ask that the hour be fixed for two P. M.

The COURT.—Have you any objection? (Addressing Mr. How.)

Mr. HOW.—I feel compelled to object to any continuation of the matter, and to urge upon your Honor's attention what I consider to be the proper and sole practice under the statute made to cover

such cases as this. I do not know what manner of presentation counsel are prepared to make or desire to make, but if it is true that the affidavit filed with your Honor is in legal form, an affidavit and sets forth the matters prescribed in section 21 of the Judicial Code, I protest that the plain and right meaning and only meaning of the statute is that your Honor is foreclosed from further proceeding with the case, and that further proceeding means not only such proceedings as are appurtenant to the relief prayed in the bill of complaint but proceeding upon this application, because this application is made in the cause and is in the proceedings in the case; and I therefore request that the Court, in obedience to the statute, will cause to be entered of record the fact the affidavit has been filed, and will cause it to be certified with the application forthwith to the Senior Circuit Judge now in this Circuit for proceedings as provided by the Judicial Code.

Mr. McENERNEY.—If your Honor please, I do not desire to enter into any discussion of this matter, first, because what I might say might be imputed to your Honor, and it would be a cruel visitation if your Honor should be held responsible for all that I think, or, indeed, for all that I say. For instance, there is a great portion of this affidavit devoted to statements of fact as to why the terms of the statute were not complied with, and I desire to ascertain whether these gentlemen can prosecute a proceeding in the Circuit Court of Appeals up to and including the 28th of March, 1916, to compel your Honor to proceed with this case, and on the 29th day

of March file an affidavit of bias and prejudice predicated upon facts, all of which existed before the 28th day of March. That is one of the things I desire to give my attention to, and will ask for the two days.

Mr. PARTRIDGE.—If your Honor please, may I suggest to your Honor that it seems to be thoroughly established by the case of *Henry v. Spear*, which is cited with approval by the United States Supreme Court in the *Steel Barrel Company* case in the 230 United States—at least, this much is established—that the Court must determine for itself whether or not the affidavit as filed is sufficient to come within the terms of section 21. Now, then, the counsel whom your Honor has requested to represent you ought, at least, to have time to advise themselves as to whether or not the affidavit does come within the terms of those two decisions; aside from everything else, it seems to me that we ought to have time to examine it in that regard. As I stated to your Honor on Monday, we were served with no copy whatsoever of this affidavit, never saw it until we came into court.

The COURT.—I do not suppose they were compelled to do that.

Mr. PARTRIDGE.—Perhaps not; at any rate, we were not able to get even a copy of it until yesterday. It is very long; and it discusses a great many matters which are involved not only in the facts, but in the law. I think we ought to have time enough to make an attempt at least to properly inform your Honor as to what the law is.

THE COURT.—There is no question in my mind; from Mr. How's interpretation of the statute, that that duty rests upon the Court to determine, primarily, and before taking any action, as to the legal sufficiency of this affidavit; that the statute expressly provides; and, feeling as I do, unconscious of any bias or prejudice existing at the time this affidavit was filed, I appreciate that it being a personal assault upon the Court, upon the Judge, as to his state of mind, it is not a question which the Judge should undertake to himself determine, without legal advice. It was for that reason that I requested Mr. McEnerney and Mr. Partridge, representing me personally, to give me their judgment. Of course, eventually, I shall be called upon to determine that fact, and if I determine, either upon my own judgment or the advice of my counsel, with which my judgment may concur, that this affidavit is of legal sufficiency to give rise to prejudice such as the statute contemplates, then I shall proceed to certify the fact to the Senior Circuit Judge. If, on the other hand, I determine that it is not legally sufficient, then it is equally my duty, my imperative duty, to ignore the affidavit and refuse to enter any such record as would be required if I were called upon by reason of the character of the affidavit to certify it to the Circuit Judge. That, of course, counsel admits by his own suggestion rests upon this Court as a duty; and that is the question that I feel, inasmuch as we cannot in matters that pertain to us personally exercise the same absolutely

free and untrammelled judgment as we can with matters affecting others, that I am entitled to the advice of counsel. And while, under the circumstances, as I suggested, as a legal proposition, the attorneys for the receivers were not entitled to have a copy of this affidavit served upon them, and have had to take their own means of procuring one, I think that the request they make is but a reasonable one, and I shall grant it.

Mr. HOW.—May I say a word, your Honor?

The COURT.—Certainly.

Mr. HOW.—I do not want to be understood as making any concession that the Court has power to pass upon the sufficiency of this affidavit, excepting as to legal form.

The COURT.—You do not need to; the statute prescribes that.

Mr. HOW.—But I did not know, from what your Honor said, but what you may have misunderstood me.

The COURT.—No, I understood you perfectly; but at least that question is involved, and it casts the imperative duty upon this Court to pass upon that question, and that is the very question which I feel I am entitled to have the advice of counsel on, and with that view, the matter may go over until Friday, at two o'clock, but I trust that counsel will be ready at that time to give me such advice as will enable me to see my way clear. I have not the least disposition in the world to delay this matter. My disposition is to have it disposed of, because I think

it will readily be appreciated that the situation is not a pleasant one, nor one that anyone would have the disposition to prolong; but to the extent of enabling me to perform a duty which the statute casts upon me, I feel that the request is but a reasonable one, to enable counsel to advisedly give me such aid as may lie in their power. Let the matter go over until two o'clock on Friday.

Mr. PARTRIDGE.—Will your Honor make an order, also, that some 20 or 30 of the routine matters of the railroad that are on this morning and were postponed on account of the suspension produced by the affidavit, directing that they go over until the same time?

The COURT.—I think that those formal matters had best go over until a week from Monday. I may not be able to be here Monday, because the Sacramento term opens Monday, and I will have to be there, but I will make it a point to be here the following Monday.

Mr. PARTRIDGE.—Will your Honor then postpone all these matters until then?

The COURT.—Until Monday, the 17th.

Mr. MADISON.—Will your Honor postpone the petition for leave to intervene of the Savings Union until Friday at two o'clock?

The COURT.—That matter may go over until then. If I should conclude, within the limits of the statute, as is provided, that this affidavit is not a disqualifying affidavit, then I shall give counsel an opportunity to proceed with any matters that they

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desire to submit as speedily as lies within their power and that of the Court, and they will find that there will be no disposition to delay any of these proceedings to anybody's injury.

(An adjournment was here taken until Friday, April 7, 1916, at two P. M.)

**Exhibit IV [to Petition for Mandamus—Affidavit
of William C. Van Fleet].**

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW
YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
BOCA & LOYALTON RAILROAD COM-
PANY, and C. L. HOVEY, Its Receiver, and
MERCANTILE TRUST COMPANY OF
SAN FRANCISCO,

Defendants.

CENTRAL TRUST COMPANY OF NEW YORK,
Intervenor.

AFFIDAVIT OF WM. C. VAN FLEET.

United States of America,
Northern District of California,
State of California,
City and County of San Francisco,—ss.

WM. C. VAN FLEET, being first duly sworn, deposes and says:

That he is a duly appointed, acting and qualified District Judge of the United States District Court for the Northern District of California, and the Judge presiding in the above-entitled matter.

That affiant has no personal bias or prejudice of any kind or character whatsoever against The Equitable Trust Company of New York, plaintiff in the above-entitled cause, and has no personal or other bias or prejudice against The Equitable Trust Company of New York as Trustee and as plaintiff in said cause.

That affiant has no personal bias or prejudice in favor of either Frank G. Drum or Warren Olney, Jr., as Receivers of the Western Pacific Railway Company appointed in said action, or their counsel John S. Partridge.

That affiant does not know the said Equitable Trust Company of New York, nor any person connected therewith except its solicitor in this cause, and that while affiant was ill at home Mr. Alvin W. Krech, President of The Equitable Trust Company of New York, called upon affiant, and that affiant has no occasion for any bias or prejudice because affiant, as Judge of said court, has always assumed,

and still does assume, that the said Trustee does and will represent all of the First Mortgage Bondholders and not any particular class thereof and will do its full duty in the premises.

That affiant has no personal or other bias or prejudice in favor of the Savings Union Bank and Trust Company, and has never, at any time, had any business with it, or connected with the said Savings Union Bank and Trust Company, and has not even any acquaintance with any of its officers except that affiant knows in a casual and social way John S. Drum, the President thereof, and that affiant did not even know that said Savings Union Bank and Trust Company was the owner of any of the Western Pacific bonds until the 6th day of March, 1916, when petition for leave to intervene was presented by its counsel.

That in respect of the controversies mentioned in Paragraph III of the affidavit of Lyman Rhoades filed herein, affiant says that the proceeding to enjoin the plaintiff from prosecuting a certain suit by it commenced in the United States District Court for the Southern District of New York against the Denver and Rio Grande Railroad Company and others, is not being prosecuted by said Receivers and their counsel at the instance of this affiant, or being prosecuted by said Receivers and their counsel at all, in this: that the order of this court, in that regard, has been reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and that in so far as said affiant is concerned, and said Re-

ceivers and their counsel, the said judgment of said United States Circuit Court of Appeals is final, and will be observed in every particular.

That in so far as the application by the Trust Company as complainant herein for a decree of foreclosure and sale of the property of the Railway Company is concerned, it is not true that said application is opposed by said Receivers and their said counsel, in this: That prior to the filing of the affidavit of bias and prejudice herein, this affiant, as Judge of said court, had determined to proceed forthwith with the hearing and trial of said cause for the purpose of entering a speedy decree of foreclosure and sale. That it was the intention of this Court on the day when said affidavit was filed, to grant the motion of said plaintiff for and set said cause for hearing for Thursday, the 6th day of April, 1916, for a hearing first, upon the question as to whether there should be an up-set price, and, second, if this court should determine that there should be an up-set price, then what the amount thereof should be, and to give all parties an opportunity to be heard in accordance with the opinion of the said Circuit Court of Appeals.

And in this behalf affiant alleges: That prior to the 6th day of March, 1916, that there had never been any application whatsoever to this court, or the Judge thereof, to set the said cause for trial, or to enter a decree therein.

That on the 6th day of March, 1916, this Court had made and entered its order directing that the Den-

ver and Rio Grande Railroad Company and the Missouri Pacific Railway Company should be made parties to this action, and had further made its order directing that thirty days' time be granted to the Receivers herein to report to this Court for action on contracts and relations with the said Denver and Rio Grande Railroad Company, and that the time limited for the said Denver and Rio Grande Railroad Company and the Missouri Pacific Railway Company to appear, and the said Receivers to report said contracts and relations, had not then expired.

That on the said 6th day of March, 1916, without any previous notice to this Court, the Solicitor for said plaintiff submitted to the Court the form of a decree, together with the stipulations mentioned in the affidavit of Lyman Rhoades.

That the said matters were presented to the Court at the opening of said court on the said 6th day of March, 1916, and it appearing that no notice thereof had been given to the Receivers, or their counsel, said Court continued the matter until 2 P. M. of said day. That at 2 P. M. of said day certain proceedings were had. That affiant refers to the stenographic report of said proceedings, and hereby incorporates the same herein.

That there has never been any opposition by the Receivers, or their counsel, to a setting of said cause or the entry of a decree therein, unless it be in the desire of said Court to have the advice of the Receivers and their counsel.

That in so far as the proceeding to bring the said

Denver and Rio Grande Railroad Company into this cause as a party defendant and to determine in said cause its liability under Contract B, is concerned, it is not true that said proceeding is being conducted by the Receivers or their counsel by the direction of this Court, or otherwise, or at all, in this: That prior to the filing of the affidavit of Lyman Rhoades herein, the said United States Circuit Court of Appeals for the Ninth Circuit had directed that a Writ of Prohibition be issued prohibiting this Court from further proceeding in the matter of its order bringing in the said Denver Company; and in this: That this Court and said Receivers and their counsel, have and do accept the said opinion of the said Honorable Circuit Court of Appeals as final in said last-mentioned matter, and neither this affiant, nor said Receivers, nor their said counsel, intend to, nor will, proceed any further therein.

That in respect of the application of the Savings Union Bank and Trust Company to be permitted to intervene in said cause in order that it may participate in the prosecution thereof, particularly of the said claim against the Denver Company, it is not true that at the time of the filing of the said affidavit there was any such application, in this: That prior to the time of the filing of the said affidavit, the said Savings Union Bank and Trust Company had withdrawn said portion of its said petition and amended the same so that its petition at the time the said affidavit was filed asked to be allowed to intervene only for the purpose of being heard upon the question of the up-set price.

And furthermore, that no petition of the Savings Union Bank and Trust Company has been granted, nor is the Savings Union Bank and Trust Company a party to the said cause.

It is not true that this affiant, as Judge of said court, identifies the Trust Company with the Reorganization Committee, and does not and never has regarded the Trust Company as in reality not acting for the bondholders who have not joined in said plan and as the representative solely of the bondholders who have joined therein, but has always assumed that said Trust Company, in accordance with its duty would at all times act impartially for the best interests of all the bondholders.

That it is absolutely untrue that in making the said statements on the 6th day of March, 1916, or any of them, this affiant clearly implied, or implied at all, that the Trustee was acting only in the interests of the bondholders who had joined in the plan of Reorganization and was not caring for all of the bondholders.

That affiant does not know what counsel for the respondents may have intimated on March 16th and 17th in the Circuit Court of Appeals, but that affiant has never intimated, nor meant to intimate, and never held any opinion that the Trustee could not be trusted to act fairly and impartially in protecting the interests of the minority bondholders as well as the interests of the majority bondholders.

That it is not true that upon the institution of the suit mentioned in said affidavit in the Southern

District of New York, this affiant, as Judge of this court, or otherwise, displayed any resentment at the Trust Company's action in commencing the same without his permission, but that on the other hand, on the hearing in open court this affiant, as Judge, stated in unequivocal terms that he had no doubt whatsoever that the said Trust Company and its counsel were acting in good faith in bringing said suit in said Southern District of New York, and that he had no feeling whatsoever in the matter arising from the fact that the District Court in California was not applied to for permission or notification given to it or affiant as such Judge. That his sole idea in enjoining said suit was his conviction, after extensive argument and investigation, that it was his duty so to do.

That affiant hereby refers to the stenographic report of all of the proceedings upon the petition of the Receivers for instructions as to whether or not said Receivers should begin suit on Contract B, and also of the proceedings upon the order to show cause, and hereby incorporated the same herein, as indicating the purpose and motive of affiant in making said order.

That it is true that counsel for the Receivers in the matter of said appeal from said order enjoining the said Trust Company maintained that said order was not an injunction within the meaning of the Judicial Code and that said counsel based their contention in that regard upon the decision of the Supreme Court of the United States in *Ex Parte Tyler*, 149 U. S. 164.

That it is not true that affiant has ever clearly or at all intimated, or was ever ready to believe, that the Trust Company instituted the said New York suit for the purpose of evading the jurisdiction of this court, or ever intimated or was ever ready to believe that the Trust Company or the majority bondholders were unwilling to confide their interests under said contract to the decision of this affiant as Judge of said court.

It is not true in any sense that this affiant, as such Judge, or otherwise, suspects or resents the conduct of the Trust Company in instituting the said New York suit, but on the contrary affiant assumes that the opinion of the Court of Appeals is correct.

That it is not true that affiant, as said Judge, or otherwise, has constituted himself a special guardian and champion of the minority bondholders, but, on the contrary, this affiant, as is his duty under the law, has at all times endeavored to act, and will continue to act for the interests of all of the bondholders and has on numerous occasions during the progress of the proceedings in open court so announced.

That it is true that the members of affiant's family had small amounts of the said Western Pacific First Mortgage Bonds but that all thereof were sold prior to the 2d day of March, 1915, when the bill to foreclose in this matter was filed in this court.

It is true that a sister-in-law of affiant had three of said bonds at the time that the said suit was commenced, but affiant has not even inquired as to

whether or not his said sister-in-law has joined the said Reorganization Committee and that by no possibility could the ownership of the said bonds by affiant's sister-in-law in any wise or manner whatsoever have any effect on the mind or judgment of affiant as Judge of said court, or otherwise, in connection with any matter involved in said action. And in this behalf, affiant alleges that during a discussion between Court and counsel on the 29th day of June, 1915, with reference to said bonds, and during the argument upon the order to show cause, affiant stated from the bench in open court, that he had once owned five of said bonds and had sold two shortly after their purchase in 1910, and had given the other three to his wife, and that his said wife had sold the same prior to the commencement of this action. That prior to the commencement of this action, affiant advised his said wife to sell the said three bonds for the reason that the same would probably go to a lower price in the market, and for the further reason that affiant expected that any action to foreclose the mortgage would be brought in the court presided over by this affiant, and affiant did not desire that any member of his immediate family should own any of said securities.

That affiant has no feeling of any kind, by virtue of the fact that said bonds were sold for less than they cost.

That in regard to the bonds owned by the sister-in-law of affiant, affiant states that he has never, in any wise, advised in regard to the same, and has

nothing whatsoever to do with the business or investments of his said sister-in-law.

And affiant further says and affirms that neither the fact that affiant or members of his family have owned any of the said bonds or the fact that his said sister-in-law owned any of said bonds at the time of the commencement of this action, or may now own the same, could or does have any effect whatsoever upon the mind of this affiant, nor has this affiant ever considered or will ever consider said owner-ships in any matter connected with this cause in any manner whatsoever.

That in respect of the statement of Garret W. McEnerney in argument before the United States Circuit Court of Appeals, affiant states that he did not know of said statement of Mr. McEnerney until he had any desire whatsoever that the Denver and Rio Court, and that affiant is informed by Mr. McEnerney that the same was an expression of the personal feeling of Mr. McEnerney, and that affiant has never had read the record of the argument before this Grande Railroad Company should be forced into the hands of a Receiver, but, on the contrary, on numerous occasions during the arguments in this court affiant has stated it was not his intention or desire, if the same could possibly be avoided, to take any step which would result in a Receivership for the Denver and Rio Grande Railroad Company.

That affiant never talked with the said Garret W. McEnerney prior to the said argument in said Circuit Court of Appeals, nor consulted with him in

regard to any matter connected with said cause or any of said writs.

That affiant had no idea whatsoever as to the line of argument which would be taken by the said Garret W. McEnerney, but was satisfied to leave the management of said argument to the judgment and discretion of his attorney.

That affiant consulted with said John S. Partridge with reference to the said writs of prohibition and *mandamus* and instructed the said John S. Partridge to confine himself strictly to a discussion of the legal principles involved therein, and affiant has learned from the stenographic record upon the hearing in the United States Circuit Court of Appeals that the said John S. Partridge did confine himself strictly to the legal questions involved.

That affiant hereby refers to the stenographic record of the argument before said Circuit Court of Appeals and hereby incorporates the same in full in this affidavit.

It is true that at the time of the appointment of the Receivers, affiant was requested to appoint Warren Olney, Jr., as sole Receiver.

It is not true that it was stated to affiant that the existing Legal Department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to this Receivership, in this: That affiant as such Judge was requested to appoint Warren Olney, Jr., sole Receiver, and it was suggested that A. R. Baldwin should act as counsel for Receiver; that at said time, said Warren Olney, Jr., was one of the attorneys for the said

Western Pacific Railway Company, defendant herein, and that the said A. R. Baldwin was also one of the attorneys for the defendant herein, and as a matter of fact the said A. R. Baldwin was attorney of record in this suit for the said defendant; that affiant, as such Judge, without intending any reflection whatsoever upon either said Warren Olney, Jr., or the said A. R. Baldwin, stated to them that it would be highly improper to take the course urged upon affiant for the reason that it has always been held, by court and text writers on Receiverships that Receivers and their counsel should be indifferent between all the parties to the action; that affiant stated that he was willing to appoint the said Warren Olney, Jr., as one of such Receivers, but deemed it proper to appoint another person to act with him; that after this it was stated to affiant that the parties had agreed upon another person to be appointed with the said Warren Olney, Jr.; whereupon, affiant stated that it was not the custom of his court to have parties to an action agree for said Court and that inasmuch as the Receivers and their counsel would be officers of and representatives of the Court in the strictest sense of usage of law and equity, and inasmuch as affiant well knew that the conduct of a transcontinental railroad would and must involve questions of magnitude, administrative, financial and legal, said Court felt justified in appointing the said Frank G. Drum as coreceiver with the said Warren Olney, Jr., and John S. Partidge as their counsel.

That affiant has no connection whatsoever with the said Frank G. Drum, but knew and knows that said Frank G. Drum is a man of the highest character and integrity, as well as of wide experience and ability in connection with large affairs, and in whose judgment and ability affiant has the utmost confidence.

That it is true that affiant was at one time the law partner of George H. Mastick, ~~the~~ present law partner of the said John S. Partridge, but that the copartnership existing between the said affiant and the said George H. Mastick had been dissolved on the 10th day of April, 1907, and that the said John S. Partridge formed a copartnership with the said George H. Mastick on or about the 15th day of May, 1907; that said affiant was never a partner of the said John S. Partridge at any time nor in any way connected with the said John S. Partridge in business; and affiant never had any personal acquaintance with John S. Partridge until after said copartnership.

That the sole actuating motive of affiant in designating the said John S. Partridge as counsel for said Receivers was the fact that affiant had, and now has, the most complete confidence in the integrity and ability of said John S. Partridge to conduct the legal affairs of said railroad and said Receivership, and to advise this Court with reference thereto.

That it is true that the son of affiant is employed by the said firm of Mastick & Partridge, but that affiant's said son is employed by said firm upon a small salary, and that affiant's said son has no in-

terest whatsoever in the earnings of said firm, or the business thereof, and cannot profit in any possible way by the fact that the said John S. Partridge is counsel for said Receivers, and said fact had nothing to do with the appointment of the said John S. Partridge as counsel for said Receivers, nor has said fact anything whatsoever to do with any judicial or other act of affiant in connection with said cause, nor does the said fact have any influence whatsoever upon the mind of this affiant and that affiant is informed and believes and, therefore, alleges that the said John S. Partridge ever since his appointment as counsel for the said Receivers has studiously avoided the employing of affiant's said son upon any matter even remotely connected with the said Western Pacific Railway Company or said Receivers, or any matter pending in the court of this affiant.

That in connection with the allegations in the affidavit that John S. Partridge declined to waive the issuance of citation upon the appeal and stipulate that the said appeal might be heard on the 16th day of March, 1916, affiant states that the said John S. Partridge has shown to affiant a copy of a letter sent to Jared How, solicitor for the Trust Company, in the words and figures following, to wit:

“March 8, 1916.

“Mr. Jared How,
Attorney at Law,
Mills Building,
San Francisco.

Dear Sir:

I have carefully examined and considered the stipulations proposed by you. They are (1) a paper headed ‘Appeal from Injunction and Order made February 21, 1916,’ and this stipulation reads as follows:

‘The undersigned hereby waives service upon them of the order allowing appeal and notice of appeal in the above-entitled cause, and hereby stipulates that said appeal may be heard on the 16th day of March, 1916, at the hour of 2 o’clock P. M. of said day or such other time as the Court of Appeals may direct.

‘It is further stipulated that no bond need be filed on the appeal in the above-entitled cause, but that the appeal bond be, and the same is hereby, waived.’

and (2) a paper headed ‘Appeal from Injunction and Order made February 21, 1916,’ reading as follows:

‘It is hereby stipulated and agreed by and between the appellants and appellees in the above-entitled appeal that the said appeal may be heard upon the following documents, viz.: Petition of Receivers for Time to Consider Contracts and filed May 19, 1915, a copy of which is

hereto attached, and the enumerated below copies of which are embodied in the Petition for Prohibition and are now on file in the Circuit Court of Appeals, said documents being the following:

1. Bill of Complaint.
2. Answer of Western Pacific Railway Company;
3. Order Appointing Receivers;
4. Amended Bill of Complaint;
5. Answer of Western Pacific Railway Company to amended bill of complaint;
6. Order of June 14, 1915, directing notice of hearing;
7. Dependent bill;
8. Restraining order and order to show cause;
9. Answer of Equitable Trust Company;
10. Affidavits of Krech, Cutcheon and Partidge;
11. Opinion of Court;
12. Injunction and Order.'

It is further stipulated that the record on appeal need not be printed, but that the documents incorporated in said petition for prohibition and attached hereto may be referred to and shall constitute the record on appeal.'

"In regard to the first stipulation, I do not see how it is possible, by any such paper, to inaugurate an appeal or to confer jurisdiction upon the Circuit Court of Appeals, and for that reason, and that reason alone, I beg to be excused from signing the same.

“In regard to the second stipulation, if you take an appeal in the manner prescribed by law, I shall certainly facilitate the establishing of the record in any manner that will fairly present the whole matter to the Court of Appeals, and it seems to me that the second stipulation presented will fairly do this. This, however, is of course subject to examination and verification and suggestions of any other papers which it may seem necessary or proper should constitute a part of the record.

Yours very sincerely,

JOHN S. PARTRIDGE,

Counsel for Receivers.”

That in respect of the order made by affiant as Judge of this court authorizing and directing the Receivers to take any steps they might deem necessary to protect the jurisdiction of the Court, affiant states that on the day that said, order was made Warren Olney, Jr., one of the said Receivers, and John S. Partridge, counsel for said Receivers, called upon this affiant in his chambers and that the said Warren Olney, Jr., stated to affiant that he wanted the direct authority of this Court in the matter of any proceedings that might be taken on said appeal; that affiant thereupon stated that he did not think any such order was necessary, but that it was the duty of the Receivers to take such steps in the matter as might be necessary inasmuch as there were no other persons who could or would appear in said Circuit Court of Appeals to present therein the legal considerations in support of the action of this Court; but that affiant stated to the said Warren Olney, Jr.,

that if he felt he needed the protection of such an order, there was no objection to making the same.

That it is not true that the action of counsel for the Receivers, or counsel for this affiant as respondent to said Circuit Court of Appeals, ever had any intention, nor was it the plan or other intention of this affiant as said Judge, to prevent the expression of the judgment of the said Circuit Court of Appeals upon the questions involved in either of said writs or on appeal; nor was it the intention to proceed in said cause irrespective of the propriety or impropriety of any course which affiant had intended to adopt with reference to said matters; that as a matter of fact, said affiant had not determined upon any course whatsoever which he would adopt with reference to said matters except that affiant believed that it was proper and to the best interests of the bondholders to make the Denver and Rio Grande Railroad Company a party to this action; but that in respect to the actions of the said counsel for Receivers in moving to dismiss the said appeal, affiant is informed by said counsel, and, therefore, avers, that said counsel made said motion for the reason that counsel believed the said Receivers were necessary parties to said appeal and that if they were not parties thereto, there would be no one whatsoever to oppose a reversal of the order of this Court, inasmuch as all parties to the action then appearing in effect consented to a reversal thereof; but that since the said Circuit Court of Appeals has entered its judgment reversing the same, affiant has, as in

duty bound, accepted as the law of the case the opinion of the Honorable Circuit Court of Appeals and intends to comply strictly therewith.

That it is not true that affiant is determined to compel prosecution of claims against the Denver Company before him in this cause, or otherwise, or at all, in this: that affiant regards the opinion of the said Honorable Circuit Court of Appeals as the law of the case and does not intend, and has not intended, to proceed any further in the matter of the Denver and Rio Grande Railroad Company or of Contract B; on the contrary, as hereinabove set forth, affiant was prepared, on the very day the affidavit of disqualification was filed, to proceed and set the said cause for hearing immediately, and to proceed in strict accordance with the opinion of said Honorable Circuit Court of Appeals.

It is not true that affiant entertains a deep, or any resentment whatsoever against the Denver Company; that, on the contrary, affiant does not know the Denver Company nor any person connected therewith; and it is not true that affiant believes the banking houses mentioned in said affidavit have conspired to protect the Denver Company or the holders of any of its bonds, against the claims of the Western Pacific Railway Company bondholders. In this behalf affiant alleges that he does not know said banking companies, or any of them, nor has he any opinion whatsoever in regard to them, or any action they may have taken.

That it is not true that affiant believes that the

Reorganization Committee or the Trust Company are co-operating in any manner whatsoever with said banking companies and that it is not true that affiant believes the Trust Company intends to endeavor to secure an unduly low up-set price to be fixed by the decree herein.

It is not true that said affiant has acquired or entertains a personal or other bias or prejudice against the said Trust Company on account of the matters and things set out in said affidavit, or otherwise, or at all. That the statements in said affidavit to the effect that there was no intimation during the publication of the plan of reorganization, on the part of said Judge or said Receivers, or of counsel for said Receivers that there would be any delay in the entry of a decree of foreclosure and sale, are false and untrue in their effect in this regard; that on the 18th day of May, 1915, the said Receivers filed in this court, the said Contract B, with other contracts and asked for time in which to report the same to this court for action thereon; that subsequently, the said Receivers filed in this court their petition praying for instructions as to whether or not they should begin a suit on Contract B; that upon the argument thereof, and in the briefs filed, it was strenuously insisted by the counsel for Receivers that the Denver and Rio Grande Railroad Company must be made a party to this action and that Contract B was one of the assets of the Receivership and must be enforced prior to an entry of a decree of foreclosure and sale. That said contention was made in open

court more than six months before the plan of reorganization was adopted at all and that the proceedings on the said petition and the order to show cause issued out of this court were pending in this court at the time the said plan of reorganization was adopted.

That it is not in any sense true, as intimated in said affidavit, that the opinion of this Court rendered on the 21st day of February, 1916, had anything whatsoever to do with said plan of reorganization.

It is not true as intimated in said affidavit that affiant as Judge of said court, or said Receivers, or their counsel, has ever done anything whatsoever to prevent the carrying out of said plan of reorganization, but, on the contrary, the matters which resulted in said orders set aside and reversed by the Honorable Circuit Court of Appeals, were presented to this court long before any plan of reorganization was ever adopted; that while the matters involved in said petition and leading up to the said order and opinion of this Court were argued on the 28th, 29th and 30th days of June, 1915, elaborate briefs were filed by counsel for said Trustee and the counsel for said Receivers, and the brief of the said Trustee was not filed until the 6th day of December, 1915, and that thereafter counsel for the Denver and Rio Grande Railroad Company appearing as *amicus curiae*, filed a brief in said matter and other counsel filed reply briefs thereto, so that the matter was not finally submitted to this Court until the 31st day of December, 1915, whereupon this affiant, as Judge of

said court, proceeded to examine into the said matter as diligently as the business of said court would permit and that the decision of this court on the 21st day of February, 1915, was in response to the said matter before this court and had no connection in any manner whatsoever with any attempt of any person to interfere in any way with the said plan of reorganization; that this affiant has never had any feeling of opposition whatsoever against said plan of reorganization nor any opinion regarding the same one way or another, and in that regard affiant states that he has never even read said plan, and does not know what said plan is, and has not formed any opinion thereon.

That it is not true that affiant, as such Judge, intended by the proceedings on the 6th day of March, 1916, to prevent any review of the Honorable Circuit Court of Appeals concerning the right of the parties to the entry of the decree, but that as a matter of fact on the said 6th day of March, 1916, affiant, as such Judge, postponed the hearing for the reason that a petition for the writ of prohibition had been filed, and for the reason that affiant as such Judge did not deem it proper to either grant or deny the applications without consideration, and for the further reason that affiant did not deem it proper practice to entertain an application, the avowed purpose of which was to have the same denied.

That with respect to the intimation that this affiant, as such Judge, rendered his decision of February 21st, 1915, and refused to permit the entry of said decree in the full belief that his action would

probably defeat the carrying out of said plan of reorganization, and with the desire that such might be the result, affiant states that the same is false and untrue in every particular, and affiant further states that he is not personally or at all opposed to said plan of reorganization, but the statement that he is is false and untrue in every particular, and that it is untrue that affiant is determined to defeat the same.

That it is untrue that affiant has a personal or other prejudice against the Trust Company, by reason of its co-operation with the Reorganization Committee in the endeavor to carry out said plan of reorganization, or for any other reason.

That in respect of the allegations that no general order was entered limiting the order confirming contracts to the period of receivership, affiant states that it is the opinion of affiant that there was never any occasion for such an order, but that the effect of such confirmation would only extend during the period of such receivership unless otherwise specifically stated.

That the only lease upon which there was any serious dispute was the lease of property to Dunham, Carrigan & Hayden Company upon which briefs were filed, and that as to said matter the solicitor for the plaintiff finally withdrew his opposition.

That affiant hereby refers to the stenographic report of all hearings upon all matters whatsoever in connection with the above-entitled action and said receivership, and hereby specifically makes the said stenographic record a part hereof.

That it is true that solicitor for the plaintiff

called upon affiant, in his chambers, with reference to a modification of the restraining order so as to permit the action in New York to go on against individual bondholders, but in that behalf affiant states that the said John S. Partridge, at said time, reported to affiant that only three suits for small amounts had been brought by individual bondholders and that there was no danger whatsoever of the results feared by the plaintiff, and that, as a matter of fact, no additional suits have ever been brought, although a period of ten months has elapsed and the suits which were commenced have never been brought to trial, so that the fears of the plaintiff in said regard have been proved to be entirely groundless.

Affiant further states that it is untrue that, by reason of the matters or things set forth in said affidavit and reiterated in paragraph fifteen thereof, or otherwise, or at all, he had any personal bias or prejudice in favor of said Receivers or their said counsel, or against the said Trust Company.

That it is untrue that, by reason of the matters and things set forth in paragraph sixteen of the affidavit of disqualification or otherwise, affiant has any personal or other bias or prejudice in favor of the said Savings Union Bank and Trust Company, but that, on the other hand, affiant has no feelings whatsoever in regard to said Savings Union Bank and Trust Company or John S. Drum, the president thereof, but as heretofore stated, never knew until March 6th, 1916, that said Savings Union Bank and

Trust Company had any interest in this matter; that affiant has not, will not, and cannot be in any wise whatsoever influenced by the fact that the said John S. Drum is a brother of Frank G. Drum and that neither said Savings Union Bank and Trust Company, nor said John S. Drum, is a party to this action, nor has yet been permitted to intervene herein.

Affiant, further states and avers, upon his oath that he has no feelings of bias or prejudice for or against any person party to the above-entitled cause, or for or against any bondholder creditor, stockholder, officer, agent or any other person who is or can be directly or indirectly interested in the above-entitled cause, or any subject matter or thing connected therewith.

That it is the intent of the affiant to proceed forthwith and with all possible expedition to the hearing of any further matters which may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale and winding up of the receivership.

That affiant is satisfied, in the state of his own mind that affiant in all matters and things in connection with said action can and will, and intends to do equal and exact justice to all parties who may be interested therein.

That under the decision of the Honorable Circuit Court of Appeals and the stipulations on file herein, there is no controversy left in said cause to which the said Equitable Trust Company of New York is

a party, in this: That the only question left in this cause over which there can be any controversy is the question of the up-set price, and that the said Trustee is not a party to, nor in anywise interested therein.

That on the 6th day of March, 1916, in open court, the solicitor for the said Trustee said:

“I also ought to call your attention to the fact that there is a blank in the form of decree presented to the Court, or, rather, suggested to the Court, and covered by the motion which has been made, for the fixing of an up-set price. In that regard I do not think that I ought to refrain from saying that my conception of the duty of the Trustee is to take absolutely no part as to the up-set price which this Court may see fit to set, excepting that it holds itself liable to furnish the Court such information as it may for the aid of the Court. The only suggestion that I think the Trustee is entitled to make with any propriety is that the upset price shall not be put at such figure as will make a sale impossible, as will not produce a bidder. What that figure is, I do not know.”

Subscribed and sworn to before me this — day
of

**Exhibit V [to Petition for Mandamus—Affidavit of
John S. Partridge].**

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW
YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY,
BOCA & LOYALTON RAILROAD COM-
PANY, and C. L. HOVEY, Its Receiver, and
MERCANTILE TRUST COMPANY OF
SAN FRANCISCO,

Defendants,

CENTRAL TRUST COMPANY OF NEW YORK,
Intervenor.

United States of America,
State of California,
Northern District of California,
City and County of San Francisco,—ss.

John S. Partridge, being first duly sworn, deposes
and says:

That he is the John S. Partridge mentioned in the
affidavit of Lyman Rhoades on file herein; that imme-
diately upon the appointment of the Receivers, on
the 3d day of March, 1915, affiant as counsel for the

said Receivers, started in an investigation of the relation between the Denver and Rio Grande Railroad Company and the Western Pacific Railway Company, and also, an investigation of the law bearing thereon; that affiant became convinced from said investigation that the contract known as "Contract B" was a part of the mortgaged property and inasmuch as the same contained specific provisions, which provisions were repeated in the Deed of Trust, that the Western Pacific Railway Company should bring all necessary action at law and in equity for the enforcement of the same (although the same likewise provided that such action could be brought by the Trustee), affiant became convinced that there was at least legal reason for believing the same should be enforced by the Receivers;

That all of the actions of affiant in regard to said Contract "B" were based upon this belief and upon nothing else whatsoever; that all of the actions taken by affiant as counsel for such Receivers have been with the desire to have the said legal question determined in the due and regular process of law and no one of said actions has ever been actuated by any motive whatsoever in favor of or against any person or persons whatsoever; that as soon as the Honorable Circuit Court of Appeals had decided otherwise, this affiant immediately accepted the said opinion of said Court of Appeals as final and conclusive upon that question and so advised the said Receivers and that neither said Receivers nor affiant have intended since the opinion of said Court of

Appeals was rendered, to take any further steps whatsoever in regard thereto, nor do they now so intend;

That no act whatsoever of this affiant or of said Receivers in bringing before said Court and in urging the enforcement of said contract, or the bringing in of the Denver and Rio Grande Railroad as a party, has ever been actuated in any way, by any feeling of opposition whatever against the Reorganization Committee or the Trustee, or any other persons connected with, or intercepted in said suit, but solely by the legal belief that the same was their legal duty;

That when affiant was requested by the Judge of this court to act as counsel for said Receivers, said Judge stated to said affiant that he desired the affiant to prepare himself and present to the Court, all legal questions involved and those alone, and that affiant, to the best of his ability and belief, has done this and this alone;

That Alan C. Van Fleet is employed in the office of the law firm of which affiant is a member; that said law firm is a partnership consisting of George H. Mastick and the said affiant; that no other person is a member of said firm and that the said Alan C. Van Fleet is not and never has been a member of said firm and has no interest whatsoever in the earnings of said firm; that the said Alan C. Van Fleet was employed by said firm immediately upon his graduation from college and on account of his character and ability, and for no other reason, and ever since has been so employed;

That affiant believes as a matter of law, and has advised the Receivers herein, that said Receivers have no interest whatsoever in the question of the up-set price and that neither said Receivers nor said affiant intend to take any part whatsoever in any proceedings with regard to an up-set price unless they may be called upon as witnesses to supply any data in their possession;

That affiant believes as a matter of law, and has advised said Receivers that since the opinion of the Honorable Circuit Court of Appeals, there is no matter left to be controverted in which said Receivers are in any wise interested, excepting only the controversy with the Southern Pacific Company arising from their complaint in intervention with regard to their claims for switching charges;

That neither said Receivers nor affiant have in any way attempted, nor desire in any manner or form whatsoever, to delay the entry of a decree herein, unless their action in presenting to said Court, the question regarding the Denver and Rio Grande can be so construed; that since this said last matter has been disposed of by the said Honorable Circuit Court of Appeals, the said Receivers and their said counsel intend to and will facilitate by any means at their disposal, a speedy entry of a decree for sale of said property and termination of the said receivership.

Subscribed and sworn to before me this —— day
of April, 1916.

Notary Public, in and for the City and County of
San Francisco, State of California.

[Endorsed] : Marshal's Docket No. 7706. No. 2781.
United States Circuit Court of Appeals for the
Ninth Circuit. In the Matter of the Petition of the
Equitable Trust Company of New York, as Trustee,
for a Writ of *Mandamus*, etc. Order to Show Cause
and Restraining Order, With U. S. Marshal's Re-
turn on Service of Writ. Filed Apr. 18, 1916. F. D.
Monckton, Clerk U. S. Circuit Court of Appeals for
the Ninth Circuit.

[Order to Show Cause and Restraining Order.]

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

In the Matter of the Petition of the **EQUITABLE
TRUST COMPANY OF NEW YORK**, as
Trustee, for a Writ of *Mandamus*, to be Issued
and Directed to the Honorable **WILLIAM C.
VAN FLEET**, Judge of The United States
District Court, for the Northern District of
California, Second Division.

The petition of the Equitable Trust Company of
New York, as Trustee, praying for a Writ of *Man-
damus* to be issued and directed to the Honorable
William C. Van Fleet, Judge of the United States
District Court, for the Northern District of Califor-

nia, Second Division, having been presented to the senior Circuit Judge of the United States Circuit Court of Appeals, for the Ninth Circuit;

It is hereby ordered that the same may be filed, and that the said Honorable William C. Van Fleet be, and he is hereby directed to appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at the courtroom of said court in San Francisco, California, on the sixth day of May, 1916, at the hour of 10:30 o'clock A. M. on said day, to show cause, if any, why said petition should not be granted, and why the writ as therein prayed should not be issued.

And it is further ordered that pending the hearing and disposition of this order to show cause, the said Honorable William C. Van Fleet be, and he is hereby restrained and enjoined from taking any steps or proceedings in that certain action pending in the United States District Court, for the Northern District of California, Second Division, and entitled "Equitable Trust Company of New York, Trustee, versus the Western Pacific Railway Company et al."

Dated April 17, 1916.

WM. B. GILBERT,
Circuit Judge.

ERSKINE M. ROSS,
Circuit Judge.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: No. 2781. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of *Man-damus*, to be Issued and Directed to the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division. Petition for Writ of *Man-damus*.

Filed April 17, 1916.

F. D. MONCKTON,
Clerk.

[U. S. Marshal's Return on Service of Writ.]

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Order to Show Cause and Restraining Order on the therein named Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court for the Northern District of California, Second Division, by handing to and leaving a certified copy thereof with said Honorable William C. Van Fleet, Judge of the United States District Court for the Northern Dist. of Cal., personally, at San Francisco, in said District, on the 18th day of April, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.
By Geo. H. Burnham,
Chief Office Deputy.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the third day of May, in the year of our Lord one thousand, nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge, Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2781.

In the Matter of the Petition of THE EQUITABLE TRUST COMPANY of New York, as Trustee, for Writ of Mandamus to be Issued and Directed by the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court for the Northern District of California, Second Division.

Order Granting Application to Amend Petition for Writ of Mandamus, etc.

Upon consideration of the Application to Amend Petition this day filed, for leave to amend the Petition for Writ of Mandamus filed in the above-entitled matter on the 17th day of April, A. D. 1916, and upon the oral motion of Mr. Jared How, counsel for the petitioner, and good cause therefor appearing, it is ORDERED that the said Petition for Writ of Mandamus be amended in accordance with said

Application for leave to amend, and that the said Application be printed and made a part of said Petition for Writ of Mandamus.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of THE EQUITABLE TRUST COMPANY of New York, as Trustee, for Writ of Mandamus to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

Application to Amend Petition [for Writ of Mandamus].

The petitioner above named prays leave to amend the petition herein by inserting therein before the paragraph beginning with the third line from the bottom of page 15 thereof in the printed record, the following paragraph, that is to say:

“Upon the conclusion of such argument of Garrett McEnerney, hereinabove referred to, and upon the 8th day of April, 1916, to which day the hearing upon the matter of such affidavit and application had been adjourned and upon which day the arguments thereon had been continued, said judge Honorable William C. Van Fleet gave orally the following opinion and decision in the matter of such affidavit and application.

‘The COURT.—I presume it is hardly necessary for me to suggest that the situation presented to the

Court is not a pleasant one; I do not suppose there is anybody within the sound of my voice who will not appreciate that that necessarily must be the fact. Resting under such a charge as has been made here places the Judge occupying the bench in a painful and embarrassing situation and makes his duty hard; but I trust that there is not lurking in the mind of anyone before the Court the idea that by reason of the unpleasant character of a duty coming before the Court it is disposed to shrink from the performance of that duty. It is not necessary to go into any recital of the facts which have been developed by the affidavits filed here on the one part and denied on the other. I thought and I now think that as to the facts set forth in this co-called disqualifying affidavit the Court was entitled to have the independent judgment of others in whom it had confidence to put an interpretation upon those facts for the purpose of laying before the Court their judgment as to whether or no they were of a character which in their nature tended to make such a case as the statute under which this affidavit was filed has in contemplation. I had my own ideas about it—I usually have; but, as I say, I wanted the aid of those whose minds were not affected by the circumscribing effect of the fact that I personally was the subject matter of those charges. We all appreciate, as I suggested the other day, that we are not the best judges in matters that pertain most strictly and vitally to ourselves. Men very frequently fail in reaching the best judgment where they attempt to decide matters of that kind for themselves. But

I was satisfied, and nothing that has been here suggested has to any extent shaken my conviction as to that, that the statute by its very terms contemplates and makes it the duty of the Court to pass not only upon the formal sufficiency of an affidavit of this kind, but the facts relied on as tending to disclose that state of mind which the law fixes as the disqualifying thing that shall require the abdication of jurisdiction otherwise vested in the Judge. That the Court is called upon to determine the sufficiency of those facts I would have been ready to hold, independently of any authorities that have been referred to here, because from the very language of the section, it seems to me that such is the necessary implication from its words. The Court must pass upon the legal sufficiency of this affidavit in order to determine the course it will pursue.

‘What does the term “legal sufficiency” mean? It does not mean that because one may arrange a set of words to conform to the framework indicated in the statute the Court must stop and say that *ipso facto* upon the filing of such a paper it is ousted of its jurisdiction. The term “legal sufficiency” means that the affidavit shall in the substantive matter set forth as showing a case of personal bias or prejudice, be of a nature which the Court can say has that tendency; and it must also determine whether or not the statute has been complied with in its other essential feature, the filing of the affidavit within the time called for by the statute.

‘I am perfectly satisfied that in every essential

aspect that has been discussed here by counsel this affidavit is not such as may be regarded under the statute as ousting this Court of jurisdiction in this case. First, that the essential facts set forth therein and relied upon as constituting the substance of the disqualifying situation do not in their legal effect tend to show any personal bias or prejudice on the part of the Court toward any party to this controversy. In the next place, I am entirely satisfied that in the attempt to show excusatory reasons for the failure to comply with the requirements of the statute to file this affidavit within the time fixed therein the facts are entirely insufficient not only to affirmatively show any excuse, but moreover the affidavit affirmatively shows that the essential facts relied upon here which would tend in any sense to create a personal bias or prejudice in the mind of this Court have been known to the parties and all of the parties to this controversy since very early in the year 1915 and soon after the action was filed in this court. Therefore when it is undertaken to allege in this affidavit reasons for not complying with the statute in filing it within time the party presenting this affidavit has been confronted with facts disclosed upon the record in this court and in the proceedings therefor had, which entirely refute those statements in the affidavit.

‘Now, is the Court to be called upon to abdicate its jurisdiction because of the filing of a paper of that kind? It has been very aptly said here, and it has been repeatedly held, that it is as much the duty of a Judge to continue in the exercise of a jurisdic-

tion which is his, if he be not disqualified, as it is to surrender that jurisdiction if the facts are such as to bring about a disqualification.

‘But I will go farther than that and say that if I felt the least sense of my inability to pass upon the rights of every party involved in this controversy and give them the due meed of justice to which they are entitled, I would ignore every consideration of technical sufficiency and would certify this affidavit to the Senior Circuit Judge with the request that someone else have the burden cast upon them of carrying out what is left before this Court of the controversy in question. But I cannot conscientiously say that I have the least question of my ability to do equal and fair and unbiased justice between those parties. Having that feeling, it is my duty to refuse to make such a certificate, and therefore I shall refuse it.

‘I don’t propose to enter upon questions that have been discussed here as to the good or bad faith of this thing. I want in that regard to say that I do not believe I am the only individual here who has had unpleasant duty to perform. I think I know the character of counsel for the plaintiff in this case sufficiently well—that is, that I have not so misjudged him as to be justified in thinking that this action, which has resulted in an attempt to disqualify the judge of this court, ever had its inception in his mind, or ever had his personal approval. And when I say that I have not been alone the one with unpleasant duties cast upon them I have reference to the fact that counsel found himself

placed in a position where, by reason of his relation to his clients and their determination that such a proceeding should be taken, it was necessary for him, in order to conform in that respect with the statute, that counsel should give his certificate that the affidavit was filed in good faith. I believe that if the real sentiments of counsel could be looked into, it would be found that that was an act very reluctantly performed on his part. So, as to that, I have no feeling of resentment in the matter whatever, nor do I resent in any judicial way the construction they have put upon the manner in which this Court has administered this trust that has been committed to it, and growing out of which they have seen fit to deduce prejudice. That is their privilege. The books are bristling with scores of cases where the same thing has been done. If they felt that they were justified in taking the course they have, then that is a matter which rests with them. It excites no resentment in my mind. Of course, I would be less than human were I to say that the character of the charges here made were such as are entirely agreeable to one's mind; I dislike it, however, more in behalf of the tribunal I represent than for my own personal feelings. If I felt that my character was such in this community that I could not safely leave it to the public to say whether the matters charged in this affidavit of a personal character would be calculated to affect my judgment, I would be very sorry to think that I have lived in this community for the length of time I have and administered justice from this bench and others

for the period that I have and yet have a feeling in the community that I would be subject to such influences as are intimated here—not charged.

‘The affidavit does not say that I will be affected by the sordid motives which one might deduce from the matters charged in it, and I don’t know exactly the purpose of putting such matters in the affidavit, unless it is to leave that sinister meaning to inference.

‘But, summing up the whole affidavit in its entirety, I am quite satisfied, as I have said, that it wholly fails to make a case under the statute which would tend to show the existence in the mind of this Court of a state of personal bias or prejudice against any party connected with this case. I do not care whether technically the Equitable Trust Company is really a party to the controversy still remaining here, or not. It is argued that it is not; but it is a formal party, and I am not prepared to say that legally it did not have a right to interpose an affidavit of this kind. I care nothing about those things. I am looking only at the merits of the matter.

‘I shall ask counsel to prepare an order in line with the suggestions that I have made, denying the application to certify this so-called disqualifying affidavit to the Senior Circuit Judge of this circuit.

‘I want to say to counsel at this time that I am quite ready to proceed immediately and at as early a date as counsel may deem compatible with the situation to dispose of the matters remaining before this Court for disposition, to the end that this prop-

erty may be taken out of the hands of the receivers and turned over to those who may become the purchasers thereof. I shall not, however, set it down for a definite date unless counsel ask me, because it may well be that counsel for the complainant will feel that it is his duty to seek and to have determined the question of whether or not my action in refusing to certify this affidavit is correct. If they are so advised I will give them plenty of time to have it done. On the other hand, however, if it is the desire of counsel to have an early date set for the disposition of matters before this Court, I will listen to any such suggestion. And I may say to counsel that, if he desires to make any such suggestion, reserving his right to object hereafter to what is done by this Court, he may have that right reserved.' "

MURRAY, PRENTICE & HOWLAND,

JARED HOW,

Counsel for Petitioner.

State of California,

City and County of San Francisco,—ss.

I have read the amendment incorporated in the foregoing application for leave to include the same in the petition herein. The facts stated in such amendment are true.

JARED HOW.

Subscribed and sworn to before me this 3d day of May, A. D. 1916.

[Seal]

FLORA HALL,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 2781. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of The Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus, to be Issued and Directed to the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division. Application to Amend Petition. Filed May 3, 1916. F. D. Monckton, Clerk.

No. 2781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the EQUITABLE TRUST COMPANY of New York, as Trustee, for a Writ of *Mandamus*, to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

BRIEF ON BEHALF OF RESPONDENT.

GARRET W. McENERNEY,

JOHN S. PARTRIDGE

Counsel for Respondent

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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No. 2781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the EQUITABLE TRUST COMPANY of New York, as Trustee, for a Writ of *Mandamus*, to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

BRIEF ON BEHALF OF RESPONDENT.

This proceeding in mandate which was begun April 10, 1916, and resulted in an order to show cause made April 17, 1916, is, in its last analysis, a proceeding (a) to obtain a judgment by this court that an application made below by the petitioner April 3, 1916, under Section 21 of the Judicial Code, to disqualify District Judge Van Fleet is sufficient in law and was filed in time; (b) to reverse an order and determination to contrary effect made by Judge Van Fleet April 8, 1916; and (c) to require Judge Van Fleet to proceed as he would

have been in duty bound to do had he decided that the application was both sufficient and timely.*

The proceeding arises out of a suit pending in the District Court for the Northern District of California (Honorable William C. Van Fleet, District Judge, presiding), brought by the Equitable Trust Company of New York, as trustee, against Western Pacific Railway Company to foreclose a first mortgage given by the Railway Company to the Trust Company to secure a bond issue of \$50,000,000 in respect whereof the Railway Company had fallen into default.

The suit was brought March 2, 1915, and new parties were impleaded in the course of the proceedings, but their names and the interests represented by them are of no consequence in dealing with the present proceeding.

We shall treat the action for the present as though there were but two parties to the suit, viz., the Trust Company and the Railway Company, and no other.

On February 21, 1916, *which was fifteen days before the commencement of the March term of the District Court*, Judge Van Fleet made an order directing that the Denver & Rio Grande and the Missouri Pacific Companies should be brought in and made parties defendant to the suit.

*This petition proceeds upon the theory that under Section 21 of the Judicial Code it was Judge Van Fleet's duty to certify the application for disqualification to the senior circuit judge for this circuit, then present therein (Pet., pp. 17, 18). Although it is of no importance whatever in this proceeding and we make no point of it, nevertheless in the interest of accuracy we desire to note the fact that under Sections 21 and 23 of the Judicial Code, in districts where there are more judges than one, another district judge may be called in and sit without the intervention of the senior circuit judge.

On March 6, 1916, *which was the first day of the March term of the District Court*, the Trust Company presented to Judge Van Fleet a stipulation, made by all the parties to the suit, for the immediate entry of the decree in foreclosure in the action and presented him with the form of such decree, calling to his attention the fact that there was a blank in the decree for the insertion of an upset price and asking that the court should determine whether an upset price was proper and, if so, what the amount should be.

In making this application the Trust Company was represented by Mr. Jared How, one of its counsel; and Mr. How was supported by Mr. John F. Bowie, one of the counsel for the reorganization committee of the bondholders of the Western Pacific Railway Company. In support of the application for an immediate entry of decree in foreclosure, affidavits by Mr. How and Mr. Bowie were read to Judge Van Fleet (Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 23 and Exhibit 24, pp. 6-9), to show that the matter of the immediate entry of a decree of foreclosure was one of great urgency for reasons which need not detain us now.

In making this application for a decree of foreclosure, the petitioner proceeded upon the theory that the order of February 21, 1916, directing the Denver & Rio Grande and Missouri Pacific to be brought in, was void; that the case was ripe for decree, and that the parties were entitled to a decree.

In the course of these proceedings on March 6, 1916, the following occurred:

“Mr. How. I submit the form of decree which is attached to the stipulation between the plaintiff and the Western Pacific Railway Company and the Central Trust Company of New York with these stipulations, and *I move the court that this decree be entered forthwith* in the terms of the form attached to the stipulation. In the alternative, if that motion shall be denied, *I move that the cause be set for hearing* and for the entry of decree at such early day as the court may assign.”

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 4.)

“Mr. How. I want to call the attention of the court to the fact, first, that in the form of decree submitted to the court, it is provided that all claims which heretofore filed and asserted against either the receivers, or the Western Pacific, or *all claims or expenses which the receivers themselves may have incurred, shall be paid by the purchaser at the sale*; and it is provided that the possession of the purchaser at the sale may be subject to the condition that *this court may retake the property so transferred in case the purchaser, or his successors, shall fail to pay the balance of the purchase price remaining unpaid, these items including taxes, the expenses of the receivers and their counsel, and the trustee, and so forth.*”

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, pp. 11-12.)

“Mr. How. I also ought to call attention to the fact that *there is a blank in the form of decree* presented to the court, or rather, suggested to the court, and covered by the motion which has been made, *for the fixing of an up-set price*. In that regard I do not think that I ought to refrain from

saying that my conception of *the duty of the trustee is to take absolutely no part as to the up-set price which this court may see fit to set*, excepting that it holds itself liable to furnish the court such information as it may for the aid of the court. *The only suggestion that I think the trustee is entitled to make with any propriety is that the up-set price shall not be put at such figure as will make a sale impossible, as will not produce a bidder. What that figure is, I do not know.*

I submit the motion."

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 12.)

"Mr. How. I move the court that this decree be entered forthwith, in the terms of the form attached to the stipulation; in the alternative, if that motion shall be denied I move that the cause be set for hearing and for the entry of the decree at such early date as the court may assign. The affidavits which I produced before your Honor are merely in support of our motion for a hearing at an early day and the entering of a decree at that time. If the court thinks it wants to consider the matter of an upset price I should think of course it ought to be allowed that time but I wanted to impress upon the court the urgency of the situation."

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 26.)

While this application was being presented to Judge Van Fleet March 6, 1916, it came to his knowledge that on the same day petitioner had applied to this court for a writ of prohibition in respect of the order bringing in the Denver & Rio Grande and the Missouri Pacific companies, and that an alternative writ of prohibition had been issued by this court and made returnable March 16, 1916. Judge Van Fleet in consequence

announced that he would not pass upon the application for the immediate entry of a decree, and, of course, that was necessarily his position if he believed that his order of February 21, 1916, bringing in the Denver & Rio Grande and Missouri Pacific was a valid order. He thereupon continued the application for the immediate entry of a decree until Monday, March 13, 1916, and again on that day continued the matter until Monday, March 20, 1916.

In the discussion, however, in respect of this motion for the immediate entry of the decree in foreclosure, Judge Van Fleet announced that if the Circuit Court of Appeals should hold that the order directing the bringing in of new parties was void the case was ready for summary disposition and he would act accordingly.

In this connection, Judge Van Fleet said:

“The COURT. Should the Circuit Court of Appeals, for instance, determine either that this court has no power to bring in the Denver, or that the presence of the Denver here is not essential, there will be no difficulty whatsoever, we can proceed and dispose of this matter in a very short time.”

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 21.)

“The COURT. If the Court of Appeals shall determine that this court is wrong in its view that Contract B must be interpreted here and may be disposed of like any other piece of physical property that is pledged under a mortgage there will be no difficulty at all in wiping the slate very clean in a very quick and expeditious way, thus disposing of all the difficulties.”

(Proceedings of March 6, 1916; see Petition, Case No. 2757, Exhibit 24, p. 24.)

That Judge Van Fleet's attitude was not misunderstood by Mr. How and Mr. Bowie is shown by the supplemental brief of petitioner, filed in this court March 23, 1916, in Cases Nos. 2755, 2756 and 2757,* where it is said (pp. 4-5):

“The order of February 21, 1916, was made for the purpose of bringing the Denver Company in so that the rights of the trustee and bondholders against that corporation to recover from it the interest and the sinking fund might be enforced in this proceeding. Though this order is void, the lower court refuses to hear the cause presented by the pleadings, or to make a decree, though the cause is ripe for decree, the refusal being predicated on the existence of the void order. No other ground for the refusal to enter the decree forthwith has been suggested either by the court or by the receivers, and *it is conceded by the court that the decree should be entered forthwith if this order be void.*” (Italics theirs.)

(Before passing on, we desire to observe that the motion for an immediate decree of foreclosure so submitted to Judge Van Fleet March 6, 1916, has never been withdrawn by petitioner, and is now submitted to and undetermined by him.)

On March 10, 1916, four days after the motion had been submitted to Judge Van Fleet, the petitioner sued

*Case No. 2755 was the proceeding commenced in this court March 6, 1916, to annul the order of February 21, 1916, bringing in the Denver & Rio Grande and Missouri Pacific companies.

Case No. 2756 was the proceeding commenced March 9, 1916, appealing from the order of February 21, 1916, which enjoined the Trust Company from prosecuting the dependent suit in New York, of which we shall have occasion to speak later.

Case No. 2757 was the proceeding in mandate commenced March 10, 1916, to compel Judge Van Fleet immediately to enter a decree in foreclosure.

out a writ of mandate in this court to compel Judge Van Fleet to grant the motion thus made by the petitioner March 6, 1916.

This petition for mandate was made returnable March 16, 1916.

On March 16, 1916, therefore, there came before this court for hearing two matters:*(a) the writ of prohibition to annul the order of February 21, 1916, bringing in new parties; and (b) the proceeding in mandate to compel Judge Van Fleet to grant the then pending motion of the petitioner to enter the decree of foreclosure in conformity with the stipulation of the parties.

The matters were argued on March 16 and 17, 1916, and on the last named day submitted for decision. The petitioner, however, filed several briefs thereafter, viz., on March 20, 23, 24 and 28, 1916, and the proceedings thus submitted remained under advisement until March 29, 1916, at 2 P. M., California time, when this court decided the matters then under advisement.

In the decision rendered that day, this court held that the order bringing in new parties was void, and that it was the duty of the court below to grant the motion which had been submitted to it March 6, 1916.

In its opinion this court first made a full statement of the facts, and then proceeded to speak of the relief

*In this connection, we omit mention of the appeal from the order of February 21, 1916, enjoining the Trust Company from prosecuting the dependent suit in New York, as a factor not necessary to be considered here.

sought here by the Equitable Trust Company of New York, and said, among other things:

“On February 21, 1916 the [district] court * * * ordered that the Denver and Rio Grande Railroad Company and the Missouri Pacific Railroad Company be made parties to the suit, and be compelled respectively to interplead, and to set up any rights which they or either of them might have in the suit.

The Equitable Trust Company * * * applies to this court for a writ of prohibition to prevent the District Court from compelling the Denver and Rio Grande Railroad Company and the Missouri Pacific Railroad Company to interplead in the foreclosure suit.

Writ of mandamus is also asked directing the District Court to grant the motion of the plaintiff made when the stipulations heretofore referred to were filed to enter foreclosure suit. To this petition answer is filed.”

(Opinion of March 29, 1916, pp. 20-21.)

The court then proceeded (p. 21) to analyze an application of the Savings Union Bank and Trust Company of San Francisco, to intervene (made to Judge Van Fleet March 13, 1916, and still pending before him undetermined), and stated the prayer of that company to include, among other things, the following:

“Further prayer is that before ordering any sale of the properties of the Western Pacific the court take evidence with respect to the value of the Western Pacific and fix an up-set price below which the commissioner making the sale will not be permitted to receive a bid for said properties; and that the up-set price be high enough to properly protect the interest of intervenors and of first mortgage bondholders not parties to the plan of reorganization.” (p. 25.)

The court then dealt with the application for a decree on March 6, 1916, and said:

“The parties to the suit were all agreeable to a decree in foreclosure, and upon the showing made by affidavit and pleadings before the court we think were entitled to have the case proceed with convenient expedition unless some matter arose which called for inquiry and delay. We say this because the affidavits presented to the court disclosed that the relief which the trustee asked for in behalf of the mortgage bondholders could only be wholly effectual by prompt judicial enforcement of the rights of the trustee.” (pp. 25-26.)

Again:

“The record shows that neither plaintiff nor defendant invoked the jurisdiction of the court as against the Denver Company, and that no question was before it for adjudication except the right of the trustee to foreclose the mortgage of the Western Pacific.” (pp. 31-32.)

Again, (*respecting upset price*):

“We are satisfied, however, that the District Court in its discretion has full power to make an order concerning an up-set price upon the sale, if such procedure should be deemed desirable by the court; of course, hearing may well be accorded to these petitioners and such others as may appear to have any interest in the proceeding for the purpose of aiding the court in ascertaining and determining what the up-set price should be.” (p. 34.)

Finally, and at the conclusion of its opinion, this court said:

“The trustee, Equitable Trust Company, had a right to proceed to foreclosure as it prayed against the Western Pacific.

The Denver Company was not a necessary or proper party to such foreclosure proceedings, and the Denver Company not being within the jurisdiction of the court and the court having no custody of its property, no order could be made compelling it to interplead in the foreclosure suit.

* * * * *

That part of the order which would compel the Denver Company and the Missouri Pacific Company to become parties to interplead having been in excess of jurisdiction, writ of prohibition is properly invoked. *U. S. v. Mayer*, 235 U. S. 67; *McClellan v. Carland*, 217 U. S. 268; *In re Rice*, 155 U. S. 396.

We shall deny the petition for a writ of mandamus because every presumption is that the District Court, being advised of the views of this court, will proceed to give the parties full measure of relief." (pp. 34-35.)

It is thus to be seen that with the handing down of the opinion of March 29, 1916, nothing remained for Judge Van Fleet to do but to determine (a) whether the case was an appropriate one for an upset price, and (b) in that event, what the amount of that upset price should be.

As we have already shown, the application submitted by the petitioner on March 6, 1916, for an immediate decree was postponed by Judge Van Fleet until March 13, 1916, and on that day until March 20, 1916.

The petition alleges (pp. 4-5):

"On the 20th day of March, 1916, the said Honorable William C. Van Fleet announced that he would make no orders and take no proceedings in the said action of the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company, until after this Honorable Court determined the matters then pending before it."

On March 20, 1916, Judge Van Fleet postponed action in the matter of the motion for an immediate decree of foreclosure until March 27, 1916, and again until April 3, 1916.

In the meantime, as already stated, this court handed down its opinion of March 29, 1916, and, although that opinion did not in terms constitute a peremptory writ of mandate commanding Judge Van Fleet to proceed to enter a decree after having determined (a) whether the case was a proper one for an upset price, and (b) if so, in what amount, nevertheless in every substantial sense it was a writ of mandate to that purport and effect.

So that, when court opened on Monday, April 3, 1916, the case was ready for summary treatment, *not only because this court had so commanded in its opinion of March 29, 1916, but because on March 6, 1916, Judge Van Fleet announced that if this court held a view in respect of the litigation contrary to the views to which he sought to give effect in his order of February 21, 1916, the matter would be open for summary disposition.*

What questions were involved which interfered with its forthwith disposition? No question except (a) the propriety of an upset price, and (b) the amount thereof, if it should be determined that the case was a proper one for an upset price.

The form of the decree had been agreed upon by the parties, and no one had objected to it.

Therefore, the sole question was one of upset price.

What prevented Judge Van Fleet from determining the matters in respect of an upset price and immediately entering a decree of foreclosure?

He was prevented from doing what he had been informally directed by this court to do by an affidavit to disqualify him for personal bias and prejudice, filed under the authority of Section 21 of the Judicial Code.

This affidavit was made by Mr. Lyman Rhoades, one of the vice-presidents of the Equitable Trust Company of New York and an officer thereof

“in charge of the Trust Department of said Trust Company, and particularly in charge of the matter of executing the trusts vested in said Trust Company, and * * * in charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company * * * and under that certain contract B hereinafter referred to.” (Pet. pp. 19-20.)

This affidavit was made in New York on March 29, 1916,

“before the Equitable Trust Company, or said Lyman Rhoades, had been informed that this Honorable Court had delivered its opinion upon the matters then pending before it.” (Pet. p. 6.)

We shall have occasion later to show (as we pointed out before Judge Van Fleet April 7, 1916) that this affidavit was made for use in anticipation or against the eventuality that the decision of this court should be against the petitioner in all of the matters taken under advisement March 17, 1916. Of this there can be no question whatever, and the result is that the affi-

davit was constructed upon the assumed existence of controversies which would have existed had the decision of this court been the other way but which had no existence whatever on April 3, 1916, nor since, because of the decision of this court.

We shall also have occasion to claim that under these circumstances it was improper to file this affidavit on April 3, 1916, because it was predicated upon the assumption that when the affidavit reached San Francisco there would be controversies undetermined, which controversies ceased to have any existence after the affidavit had been mailed on March 29 1916, and before it reached San Francisco in the mail.

These matters, however, must be reserved for later consideration, and we resume our narrative.

The affidavit was executed in duplicate, and the duplicates were received by Mr. How at San Francisco, the first on Sunday, April 2, 1916, and the other in the first mail of Monday, April 3, 1916. (See his testimony April 7, 1916, p. 90.)

The significance of these dates can be made quickly apparent.

On March 18, 1916, the day following the conclusion of the arguments before this court in the matters then before it, Mr. Rhoades arrived from New York in San Francisco (Pet. p. 61), and he remained until after Judge Van Fleet announced on March 20, 1916, that he would take no steps in the suit before him until after this court should hand down its decision.

In the meantime, however, and while Mr. Rhoades was in San Francisco, on March 18, 19 and 20, 1916, an affidavit to disqualify Judge Van Fleet was in course of preparation, for Mr. How testifies:

“I saw a part of a draft when Mr. Rhoades was here, but I paid very little attention to it.

* * * * *

I would like to explain that answer if you will permit me. I was extremely solicitous not to have any part in framing this affidavit. I had been in the case from beginning to end, sometimes in very bitter controversies, and I regret to say that at times my personal relations with Mr. Partridge were not as pleasant as I would have liked to have them. I was extremely desirous and so stated that I did not want any possibility of being accused of having my personal feeling in the matter enter into any belief that the Equitable Trust Company or its officers might entertain in the premises; therefore I refused to have anything to do with drawing this affidavit. I saw some preparations going on but did not stay by them; I did not talk with Mr. Rhoades myself about the matter three minutes. The affidavit is not mine; it is the affidavit of the officers of The Equitable Trust Company of New York, prepared in New York and sworn to in New York and sent to me to file as counsel. I considered it my duty to file it and I filed it. I believe it was made in good faith because I seldom have seen a man more conscientious in regard to what he should swear to than Mr. Rhoades was so far as I did observe him.”

(Proceedings of April 7, 1916, pp. 94-95.)

It is here to be noted that although the petitioner was engaged on March 18, 19 and 20, 1916, in preparing to disqualify Judge Van Fleet, it was maintaining a proceeding before him for the immediate entry

of a decree of foreclosure (which it never withdrew), and it was maintaining, and continued until March 29, 1916, to maintain, in this court a proceeding to compel him to do so.

We have already suggested that the affidavit in course of preparation in San Francisco on March 18, 19 and 20, 1916, and completed and executed in New York March 29, 1916, was begun and completed for use in the event that the decision of this court should be against the petitioner in the matters taken under advisement March 17, 1916; and we think that it is very clear that in the preparation of the affidavit there was no idea that it would be used in the event the proceedings under submission in this court should be decided *for* the petitioner instead of *against* the petitioner.

Although this court may not be aware of the fact, it was nevertheless the general expectation of the parties that this cause would be decided before the end of March, because the calendar of the then term of this court came to an end in the latter part of March and it was believed by the parties that the decision would be handed down before the circuit judges then sitting should return to their homes.

When Monday, March 27, 1916, passed without a decision by this court and the proceedings before Judge Van Fleet had been postponed to April 3, 1916, the petitioner was alive to the fact that in all probability during the then current week the decision of this court would come down and would leave Judge Van Fleet

ready to proceed to carry out his order of February 21, 1916, if the decision should be adverse to the petitioner. We assume, therefore, that during the week of March 27, 1916, it was regarded by the petitioner as highly important that the affidavit should be here, ready for filing, not later than the first mail of Monday, April 3, 1916, and, presumably, to guard against the danger of delay or loss in the mails the affidavit was executed in duplicate, one of the duplicates coming into Mr. How's hands on Sunday, April 2, 1916, and the other in the first mail of Monday, April 3, 1916.

The affidavit was filed before the opening of court on Monday, April 3, 1916, and on that day called to the attention of Judge Van Fleet, who requested that it be read (Pet., p. 69). Counsel for petitioner replied:

"Mr. How. I protest against doing that, because I think the filing of the affidavit is all that is required. I am quite willing to read it though."

After the affidavit had been read and during a colloquy between court and counsel, Mr. How said (Pet., p. 116):

"The case of Henry v. Speer, 201 Fed. 869, is the only case I know of under this section of the statute."

Mr. How read from the decision just cited, as follows (Pet., p. 117):

"Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no

other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

(201 Fed. 872.)

He later said (Pet., p. 126):

"Mr. How. The only decision that I know of is the one I read to your Honor."

Judge Van Fleet then postponed the matter of his determination in respect of the affidavit for disqualification until Wednesday, April 5, 1916, whereupon the following occurred (Pet., p. 128):

"Mr. McENERNEY. In the application filed here on Monday, if your Honor please, under section 21 of the Judicial Code, your Honor has requested Mr. Partridge and me to appear here and lay before you such considerations respecting the law and facts as occur to us; as we were not able to get a copy of the affidavit until yesterday, and as I was not able to see it until this morning, we ask that the matter stand over until Friday, and as I am not able to be here in the forenoon, we ask that the hour be fixed for two P. M."

The matter was then adjourned until Friday, April 7, 1916, at 2 p. m., whereupon evidence was introduced, and the matter presented to the court by counsel and decided by Judge Van Fleet.

There were offered in evidence (a) the records, proceedings, briefs and registers of action in this court in cases Nos. 2755, 2756 and 2757, decided March 29, 1916, and a stenographic transcript of all the proceedings had in this court in said case, on March 16 and 17, 1916;

(b) the records, pleadings and all proceedings had in the District Court in the suit in foreclosure, together with a stenographic report of all proceedings had in that cause, from its commencement, and the (form of) decree presented to Judge Van Fleet by Mr. How March 6, 1916; (c) the oral testimony of Mr. Jared How, and (d) the affidavits of Judge Van Fleet and Mr. Partridge.

This evidence and the printed record and the stenographic account of the proceedings of April 3, 5, 7 and 8, 1916, are both necessary and sufficient for a full understanding of this proceeding.

At the conclusion of the proceedings of Saturday, April 8, 1916, Judge Van Fleet ruled that the affidavit had not been filed in time; that no good cause had been shown for the failure to file the same ten days before the commencement of the term, and also that the affidavit did not otherwise conform to the requirement of the statute; and he refused to make the order requested by the petitioner, which read as follows (Pet., p. 65):

[Title of Court and Cause.]

“An affidavit of personal bias and prejudice and application that another Judge shall be designated for further proceedings in this action, accompanied by a certificate of counsel of record for plaintiff herein that such affidavit and application are made in good faith, having been filed by said plaintiff in this action.

It is hereby ordered that the fact of the filing of such affidavit and application be entered on the records of the court and that an authenticated

copy thereof shall be forthwith certified to the Senior Circuit Judge for this circuit now present in the circuit, to the end that such proceedings may be had thereon as are provided by law.”

We have now come to the end of our narrative.

These are the facts upon which the present proceeding turns, and the question presented is whether, considering that Judge Van Fleet has decided the application to be both insufficient and not made in time, this court will reverse that decision and issue its process in accordance with such reversal.

The sections of the Judicial Code involved are Sections 20, 21, 14, and 23, and read as follows:

“Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal **bias or prejudice** either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside

with absolute impartiality in the pending suit or action."

"Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

"Sec. 14. When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein."

"Sec. 23. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the dis-

trict lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

We proceed to consider the legal questions involved.

I.

EX PARTE AMERICAN STEEL BARREL CO. (1913), 230 U. S. 35, IS CONCLUSIVE HERE, FOR IT DECIDES (a) JUDGE VAN FLEET HAD JURISDICTION TO RULE "THAT THE AFFIDAVIT HAD NOT BEEN FILED IN TIME OR THAT IT DID NOT OTHERWISE CONFORM TO THE REQUIREMENT OF THE STATUTE"; (b) HIS ERROR IN SO DOING, IF ANY THERE WAS, IS TO BE REVIEWED UPON THE COMING HERE OF AN APPEALABLE ORDER OR DECREE IN THE CASE, AND (c) MANDAMUS WILL NOT LIE.

Ex Parte American Steel Barrel Co., (1913) 230 U. S. 35, arose out of the affairs of a corporation which had been adjudged to be bankrupt in involuntary proceedings had before District Judge Chatfield. Later, the creditors made application to extend the receivership to the property of the American Steel Barrel Company said by them to be owned by the bankrupt. March 15, 1912, Judge Chatfield filed an opinion denying this application, but no order was made in accordance therewith because counsel for the creditors asked for time to make a new application.

The new application was filed on March 29, 1912, and, on the same day, an application to disqualify Judge Chatfield for personal bias and prejudice.

It is to be noted that this application was not filed until March 29, 1912, which was less than ten days

before the April term of the district court—a fact noted by the court (230 U. S. 44); and, moreover, the proceedings had been pending before Judge Chatfield for a long time prior to March 29, 1912.

District Judge Chatfield adjudged the proceedings to be sufficient and timely, and certified them to Senior Circuit Judge Lacombe, who on April 2, 1912, appointed District Judge Mayer to sit in the case.

“Thereupon Judge Mayer assumed jurisdiction and has since made many interlocutory orders and rulings in the case, to all of which the opposite parties in the proceeding objected and excepted upon the ground that his designation was null and void. Nevertheless, Judge Mayer continued to exercise jurisdiction from the time of his designation, in April, 1912, down to the filing of this petition in February, 1913.”

230 U. S. 42.

The proceeding before the Supreme Court was (a) to compel District Judge Chatfield to resume jurisdiction and, among other things, to enter an order in accordance with his opinion of March 15, 1912; (b) to vacate the order of Senior Circuit Judge Lacombe designating Judge Mayer to sit in the place of Judge Chatfield; and (c) to quash and set aside all proceedings taken in the bankruptcy proceeding by Judge Mayer.

The Supreme Court said (230 U. S. 45):

“We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that ‘personal bias or prejudice’ existed”,

and decided (a) that Judge Chatfield had held the affidavit sufficient in law; (b) that if Judge Lacombe had mistakenly appointed Judge Mayer he could not be compelled through a writ of mandamus to undo what he had done; (c) that if Judge Mayer's appointment was "wholly beyond the judicial power of the senior circuit judge, his authority to make any order or decree acting thereunder might have been excepted to, and thus made the subject of review in due course of law"; (d) that a writ of mandamus will be granted "only when it is clear and indisputable that there is no other legal remedy"; and, finally, (e) that "the long delay in asking the extraordinary remedy of mandamus would fully justify this court in the exercise of a sound discretion in denying relief".

In the course of its opinion, the court, speaking of proceedings to disqualify a judge under Section 21 of the Judicial Code, said:

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him

between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

230 U. S. 43-44.

"We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that 'personal bias or prejudice' existed. If Judge Chatfield had ruled that the affidavit had not been filed in time or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry v. Speer*, 201 Fed. 869; *Ex parte M. K. Fairbank Co.*, 194 Fed. 978; *Ex parte Glasgow*, 195 Fed. 780, affirmed by this court in 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753.

* * * * *

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. *Ex parte Newman*, 14 Wall. 152, 165, 20 L. ed. 877, 879; *Bayard v. United States*, 127 U. S. 246, 32 L. ed. 116, 8 Sup. Ct. Rep. 1223; *Re Morrison*, 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246."

230 U. S. 45.

It will be helpful to a full understanding of Section 21 of the Judicial Code to review briefly the three cases above cited, which deal with that section.

Ex parte Fairbank Co., (1912) 194 Fed. 978, was an application by the Fairbank Company to disqualify District Judge Jones of Alabama for personal bias and prejudice, and arose out of an action pending in his district, entitled *Jackson Lumber Co. v. Fairbank Co.*

The controversy arose out of a letter written by the attorneys of the Fairbank Company to Circuit Judge Shelby, asking for the appointment of another district judge to try the case upon the ground that the trial had been too long delayed. Judge Shelby sent the application to Judge Jones, who took exception thereto in a long letter to Judge Shelby, a copy of which he put into the hands of the attorneys for the Fairbank Company. Thereupon the application to disqualify Judge Jones followed. This application was overruled and denied by Judge Jones (p. 986), who decided, among other things, as follows (p. 985):

“The application and affidavits are fatally defective, whether construed separately or in connection with the application to which they refer, because they do not charge as a matter of fact that the judge ‘has a personal bias or prejudice against the defendant or in favor of the plaintiff’. They affirm in legal effect only that affiants are ‘informed and believe’ such is the fact.

* * * * *

They are not accompanied by any statement, as the Judicial Code explicitly requires, ‘of the facts and the reasons for the belief’, save in one immaterial instance, the correspondence, which on its face, both as matter of law and morals, disproves the existence of either bias or prejudice between the parties.

* * * * *

The correspondence between the presiding judge and Judge Shelby, made an exhibit to the petition, shows on its face as a matter of law that the presiding judge has no prejudice against the defendant or bias for the plaintiff. It does not even show prejudice against the petitioner’s attorney who wrote the application which called forth the letter to Judge Shelby.”

Again (p. 990):

“It is not the proper construction of the Judicial Code to hold that Congress intended that any reason that a litigant may choose to assign in his affidavit, however absurd or ridiculous in point of law or morals, will disqualify the judge, or render it improper for him to preside in the case. ‘The statute meant that the cause should be a legal and substantial one.’ 2 Metc. (Ky.) 629. The facts stated must be strong enough to overcome the presumption of the trial judge’s integrity and of the clearness of his perceptions. *State v. Bohan*, 19 Kan. 54. ‘The affidavit or affidavits must not only state facts, but the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice which will in all probability prevent him from dealing fairly with the defendant.’ *People v. Findley*, 132 Cal. 304, 64 Pac. 472.”

In *Ex parte Glasgow*, (D. Ct., N. D. Ga., 1912) 195 Fed. 780, Glasgow was indicted and convicted for depositing an obscene book in the mails. The conviction occurred before the Judicial Code went into effect, but his sentence came on later. He sought to disqualify the judge from hearing his motion for arrest of judgment, etc., under Section 21 of the Judicial Code. The trial judge overruled his application under the section and sentenced him to imprisonment. He then sued out habeas corpus. The application for the writ of habeas corpus was denied and the prisoner remanded.

Said the court (pp. 782-783):

“The question is, first, whether or not the alleged error of the judge in holding this affidavit ineffectual to stop the case at the stage it had reached, under all the circumstances, could have

been taken up for review to the Circuit Court of Appeals for the Third Circuit. Counsel urges that it could not, because, as he states, there was no judge to certify the bill of exceptions or from whose judgment and action the writ of error could have been taken. The position, as I understand it, is that the moment the affidavit was filed the judge became disqualified absolutely and any act of his thereafter, in the case, would have been void. I am unable to agree with counsel about this. There does not seem to me to be the slightest difficulty where the suggestion is made under this section of the new Judicial Code, or otherwise, that a judge is disqualified and he overrules it, and proceeds to try the case or to conclude it if he is engaged in trying it, so far as that action can be taken to the proper appellate court for review, the judge who tries the case can certify to what occurred on the trial for the purpose of allowing the same to be so reviewed.

This being true, the action of the judge was such that it was reviewable, and errors of a judge in the trial of a case will not be considered by another court on habeas corpus.

* * * * *

As has been stated, all that was done in the case, including the action of the judge with reference to the affidavit filed under section 21, was a matter for review by the Circuit Court of Appeals on writ of error, and for the court here to pass upon these questions upon a writ of habeas corpus would clearly be beyond the proper scope and use of that writ."

Henry v. Speer, (C. C. A., 5th C., 1913) 201 Fed. 869, was a petition in mandate to require District Judge Speer to certify a disqualifying affidavit to the senior circuit judge and to desist from further jurisdiction in a cause.

The court held that the affidavit was insufficient because it did not state that Judge Speer had “a *personal* bias or prejudice”.

The court said (p. 872):

“But the statute requires the use of the word [personal], and it may not be avoided. Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions. The affidavit filed below illustrates the necessity for such compliance. Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and ‘against deponent’s right to recover.’ Section 21 is not intended to afford relief against this situation.

Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification.

The judge having correctly ruled that the affidavit herein filed was not the affidavit specified and required by the statute, the duty was not imposed upon him to comply with the provisions of section 20.

The petition for mandamus will be denied.”

It is to be observed that it was not decided in this case that mandamus would lie, but it was in terms decided that the judge sought to be disqualified had "the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency".

In this case Judge Van Fleet had the additional duty to determine whether good cause had been shown for a failure to present the affidavit "in time".

Thus two judicial duties were imposed upon Judge Van Fleet, and if he erred in either or both his action must be reviewed upon appeal and cannot be reversed on mandamus (230 U. S. 45).

II.

THE DECISION OF EX PARTE AMERICAN STEEL BARREL CO. (1913), 230 U. S. 35, THAT MANDAMUS WILL NOT LIE IS IN ACCORDANCE WITH THE SETTLED RULE OF THE SUPREME COURT.

The power of the federal courts to issue mandamus is in aid of their appellate jurisdiction, and mandamus is granted "only for the purpose of bringing the case to a final judgment or decree, *so that it may be reviewed*". This is a totally different power from the power which exists in many of the states and which, in those states, is referable not to appellate jurisdiction but to general supervisory power over inferior courts and officers.

This is well brought out in *Kendall v. United States*, (1838) 37 U. S. (12 Pet.) 524, where it is said (pp. 620-622):

“The theory of the British government, and of the common law is, that the writ of mandamus is a prerogative writ * * *. And the power to issue this writ is given to the King’s Bench only, *as having the general supervising power over all inferior jurisdictions and officers, and is co-extensive with judicial sovereignty.*

And the same theory prevails in our State governments, where the common law is adopted, and governs in the administration of justice * * *.

But the writ of mandamus, as it is used in the courts of the United States * * * cannot, in any just sense, be said to be a prerogative writ, according to the principles of common law.

* * * * *

Under the Judiciary Act the power to issue this writ, and the purposes for which it may be issued in the courts of the United States, * * * is given by the fourteenth section of the act, under the general delegation of power ‘to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law’. And it is under this power that this court issues the writ to the circuit courts to compel them to proceed to a final judgment or decree in a cause, *in order that we may exercise the jurisdiction of review given by the law*; and the same power is exercised by the circuit courts over the district courts, *where a writ of error or appeal lies to the Circuit Court*. But this power is not exercised, as in England, by the King’s Bench, as having a general supervising power over inferior courts; *but only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed*. The mandamus does not direct the

inferior court how to proceed, but only that it must proceed, according to its own judgment, to a final determination; *otherwise it cannot be reviewed in the Appellate Court. So that it is in a special, modified manner, in which the writ of mandamus is to be used in this court, and in the circuit courts in the States.*"

The ampler power which exists under the constitutions of many of the states will be made clear by a reference to the California rule.

See:

Hyatt v. Allen, (1880) 54 Cal. 353;

Matter of Davidson, (1914) 167 Cal. 727, reversing same case, (1914) 24 Cal. App. 407.

The difference between the Federal rule and the California rule is well brought out in *Vine v. Jones* (1900), 13 S. D. 54; 82 N. W. 82. This was a proceeding to compel the circuit court to hear and determine whether the judge of the county court had become disqualified to act in an estate and, if so, to transfer all matters relating to such estate to the circuit court. The circuit court had refused to hear the matter, but was compelled to do so.

In the opinion it is said (p. 84):

" 'No doubt the general rule is that an appellate court will not, by mandamus proceedings, review the decision of an inferior court, nor require such court to reverse its decision, and enter a different one; and it may be that a court possessing strictly appellate powers only ought never to do this, and so the courts of many of the states have so stated the rule without qualification; but the supreme courts of Michigan, Louisiana, and Alabama have not been governed by this rule, because they have

held their powers and jurisdiction, under their respective constitutions, to be more than simply appellate. The constitutions of those states, like our own, confer upon the supreme court, besides appellate jurisdiction, a general superintending control over all inferior courts. Article 5, § 2, Const. S. D. This provision materially enlarges the powers of otherwise only appellate courts, and enables them, by means of their various writs, prerogative and remedial, to control and correct the decisions of inferior courts in special cases, and prevent injustice and irreparable injury, when the circumstances demand an immediate review, the case is urgent, and an appeal will not afford an adequate remedy.' ”

If we keep in mind (a) the plenary power in mandamus possessed by the courts of some of the states, and (b) the limited power in mandamus possessed by federal courts, we shall not make the mistake of applying decisions of state courts, which are inapplicable in federal cases.

In *Ex parte Roe*, (1914) 234 U. S. 70, a Federal district judge refused to remand a case to the state court and an attempt was made to review his decision by mandamus. This case collects all the late authorities upon the subject of mandamus, and decides (pp. 72-73):

“Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; *Re Metropolitan Trust Co.*, 218 U. S. 312, 54 L. ed. 1051, 31 Sup. Ct. Rep. 18. Like any other ruling in the progress of the case, it will be regularly subject to appel-

late review after final judgment, and the authorized mode of obtaining such a review, the action being at law, is by a writ of error. Judicial Code, §§ 128, 238; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 582, 40 L. ed. 536, 542, 16 Sup. Ct. Rep. 389.

The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal."

The court then cited a long list of cases, concluding with the important decision in *Ex parte Harding*, (1911) 219 U. S. 363, and commented upon it as follows (234 U. S., p. 73):

"In the last case the subject was extensively considered and it was held that the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error or an appeal. To that view we adhere, and therefore we are not here at liberty to consider the merits of the question involved in the District Court's ruling."

U. S. v. Judges (C. C. A. 8th C., 1898), 85 Fed. 177, involved an application on behalf of a person convicted of crime who sought by mandate to procure his admission to bail. The court decided that he was not entitled to be admitted to bail, and its action was affirmed in the language following (pp. 179-180):

"The question whether the relator is entitled to be admitted to bail while his appeal is pending in the United States court of appeals in the Indian Territory is a judicial question which has already been decided by that court after full argument, and

the only purpose which the relator seeks to accomplish by this writ is to obtain a review of that decision by this court, and its direction to the court below to reverse the judicial decision it has already rendered. But the writ of mandamus may not be made to perform the office of an appeal or of a writ of error to review the action of a court in the lawful exercise of its jurisdiction, nor can it issue to command a court or an officer to decide a judicial question in a particular way; much less may it be invoked to direct such a court or officer to reverse a decision of a judicial question which has already been rendered. In *re Rice*, 155 U. S. 396, 403, 15 Sup. Ct. 149; *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379, 13 Sup. Ct. 758; In *re Parsons*, 150 U. S. 150, 156, 14 Sup. Ct. 50; *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. 825; *Ex parte Whitney*, 13 Pet. 404."

It is clear from the foregoing that mandamus will not lie, and, if we stop to consider the facts here involved, it is made all the clearer that the remedy should be by appeal. On April 3, 1916, the case was ready for a summary disposition of the petitioner's motion for an immediate entry of the decree. If, in the making of that decree, Judge Van Fleet (a) decided either that an upset price was or was not proper in the case, or (b) having decided that it was proper, fixed the amount too high or too low, it would have been open for the petitioner forthwith to take an appeal, and upon that appeal it could have reviewed the error committed by Judge Van Fleet, if error it were, in deciding that the attempt to disqualify him was insufficient and not in time.

In all of this we are not unmindful that mandamus has been granted in a case where "*the order has no*

judicial character but is simply an unauthorized exclusion of him [the litigant] by virtue of de facto power'' (*Ex parte Uppercu* [1915], 36 Sup. Ct. Rep. 140, 141), and in some cases where there was a "*clear absence of jurisdiction*". (See *In re Dennett* [C. C. A., 9th C., 1914], 215 Fed. 673; *In re Griggs* [C. C. A., 8th C., 1915], 227 Fed. 795.) (It is by no means clear that the power of the Circuit Court of Appeals in the matter of mandamus is as comprehensive as that of the Supreme Court, but we do not think that this question need be considered in the decision of the present proceeding, and we shall not go into the discussion of that question.) *As we have already seen, however, there can be no question about the jurisdiction of a judge, sought to be disqualified, to determine the sufficiency and timeliness of the application, and, that factor being present here, the authorities just cited also sustain us in the contention that mandamus will not lie.*

III.

A JUDGE SITTING TO DETERMINE AN APPLICATION FOR HIS OWN DISQUALIFICATION IS ACTING JUDICIALLY, AS MUCH SO AS IF HE WERE HEARING AN APPLICATION TO DISQUALIFY ANOTHER JUDGE OR TO CHANGE THE VENUE OF AN ACTION OR TO REMAND A CAUSE FROM A FEDERAL TO A STATE COURT.

In *Ex parte American Steel Barrel Co.*, (1913) 230 U. S. 35, it is said that Section 21 of the Judicial Code only applies where "the affiant is able to state * * * facts and reasons *which tend to show* personal bias or

prejudice" (p. 43); and that the judge sought to be disqualified was bound to determine and rule whether or not the affidavit was timely and sufficient (p. 45).

In *Henry v Speer*, (C. C. A., 5th C., 1913) 201 Fed. 869, it is decided that "of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and *to determine its legal sufficiency*" (p. 872).

In *Ex parte Fairbank Co.*, (1912) 194 Fed. 978, it was held that "*the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice which will in all probability prevent him from dealing fairly with the defendant*" (p. 990).

See also:

Schmidt v. Mitchell, (1897) 101 Ky. 570; 41 S. W. 929, 934;

Givens v. Lord Crawshaw, (1900) 21 Ky. Law Rep. 1618; 55 S. W. 905;

Powers v. Commonwealth, (1902) 114 Ky. 237; 70 S. W. 644;

Tolliver v. Commonwealth, (1915) 165 Ky. 312; 176 S. W. 1190.

In *Schmidt v. Mitchell*, *supra*, the court says (p. 934):

"In the case of *Insurance Co. v. Landram*, 88 Ky. 434, 11 S. W. 367, 592, this court held that, where such an affidavit is filed, it becomes the duty of the judge to pass upon the sufficiency of the affidavit, and to determine whether the facts stated in the affidavit make it improper for the presiding judge to try the case. It was there held that it was insuffi-

cient to state that the party making the affidavit believed he could not obtain a fair and impartial trial, and the court said that: ‘* * * If the charges are false, they should be made in such a manner as would subject the party making them to criminal punishment. The fact or facts upon which the belief that the judge will not give the litigant a fair trial should and must be stated in the affidavit, and they must be of such a character as shall prevent the judge from properly presiding in the case.’ A careful examination of the affidavit filed in this case shows that the averments are based almost entirely upon hearsay, and that it is not drawn in conformity with the rule laid down in the Landram case, *supra*.”

In *Tolliver v. Commonwealth*, *supra*, it is said (p. 1193):

“The judge himself must pass upon the facts stated as to whether or not they constitute a sufficient cause to require him to vacate the bench, but his decision on such a question may be reviewed by this court.”

In *Bell v. Bell*, (1910) 18 Idaho 636; 111 Pac. 1074, the court says (p. 1075):

“If the facts constituting prejudice must be set forth in the affidavit, then the judge may determine whether or not as a matter of law such facts constitute legal prejudice.”

In *Hays v. Morgan*, (1882) 87 Ind. 231, the syllabus reads as follows:

“An affidavit for a change of venue for bias of the judge, which discloses that a decision by the court of a question of law against the party was the real reason which induced the application, is insufficient, inasmuch as the charge of bias is fully negatived by the affidavit itself.”

This case is instructive for the reason that in Indiana the facts out of which bias and prejudice are claimed to arise need not be alleged. The Indiana statute requires only an affidavit alleging that the judge is biased or prejudiced. It does not require a statement of the facts or reasons upon which the charge is based. In the case at hand, however, the party went beyond the requirement of the statute and stated the reasons upon which he based his belief. The court thereupon held that the reasons given qualified the opinion of the affiant that he could not secure a fair trial. The affidavit thus being held insufficient, the motion was properly denied. In this connection, the court said (p. 233):

“When he in the affidavit qualifies the general charges of bias and prejudice, by alleging the reasons which induced him to make them, and the reasons were that the judge had made a ruling and rendered a decision against him upon a legal proposition, without alleging that the ruling and decision was wrong or made through prejudice, we think he destroyed the force of the general charges, and failed to show sufficient cause for a change.”

In *Talbot v. Pirkey* (1903), 139 Cal. 326, *prohibition* to a judge who decided against his own disqualification *was refused*. The court said:

“Having jurisdiction to try the cause, he cannot be prohibited from doing so, and his error, if error there was, in denying the motion can only be reviewed on appeal.”

People v. Compton (1899), 123 Cal. 403, 412-414, deals with an affidavit to disqualify a judge. *The judgment and order* were reversed and cause remanded because the judge should have disqualified himself.

In *Hoyt v. Zumwalt* (1906), 149 Cal. 381, 388, *the judgment and order appealed from* were affirmed, and it was decided that the court did not err in refusing to call in another judge to hear and determine the motion, and did not err in denying it on the showing made. It was said:

“To support the motion facts must be stated from which it may be reasonably inferred that such bias exists.”

In *Swan v. Talbot* (1907), 152 Cal. 142, *the judgment and order were appealed from* notwithstanding an unsuccessful attempt to disqualify the trial judge. The court said (p. 144):

“The law has seen fit to impose this painful duty upon him, and he may not shirk its performance.”

In re Friedman's Estate (Sup. Ct. Cal., December 13, 1915), 153 Pac. 918, involved an unsuccessful attempt to disqualify Judge Graham, of the Superior Court for San Francisco. The motion to transfer the cause was denied and *an appeal followed*:

The court said (pp. 924-925):

“Thus we have reviewed, perhaps with undue detail and discussion, the separate contentions of appellants touching the bias and prejudice of the judge. It can never be an agreeable duty for a judge himself to pass upon his question, but it is a duty the performance of which our law imposes on him. It is both expected and presumed that he can and will perform that duty with impartiality. *Hoyt v. Zumwalt*, 149 Cal. 381, 86 Pac. 600. It is as much his duty to retain a case in which he is not disqualified as to transfer a case in which he is disqualified. *Heinlen v. Heilbron*, 97 Cal. 101, 31

Pac. 838; *Swan v. Talbot*, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066. Wherever an honest doubt may be thought to exist, we believe the profession need have no fear but that the trial judge will with alacrity resolve that doubt in favor of the moving party. No judge desires to sit in a cause where his fairness is questioned. Where it is seriously questioned, he, more than any, will desire that the transfer be made, because he, better than any, knows that, while it is of first importance that the source of justice be fair and impartial, it is of secondary importance only that by the litigants before him it should be believed to be fair and impartial. But in the case before us not only the long delay in preferring the charge, but the foundations of the charge itself, are so unsubstantial that it would have been a failure of duty on the part of the judge to have made any other order than that which is here presented for review."

Let us sum up the effect of these authorities.

Take first the matter of personal bias or prejudice. As to this "the facts and reasons" must be given, and those facts and reasons must "*tend to show*" personal bias and prejudice (230 U. S. 43). The judge sought to be disqualified must consider the affidavit and "determine its legal sufficiency" (201 Fed. 872), and "the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice" (194 Fed. 990).

How is it possible for a judge to decide these matters without acting judicially when doing so?

Take only the language of the Supreme Court (230 U. S. 43) that the affiant must be able to state "facts

and reasons which tend to show personal bias or prejudice''. Probative facts which tend to show an ultimate fact must have such probative value as would justify a judge or a jury in finding the ultimate fact from the probative facts thus adduced. Therefore they require, of their very nature, judicial action to determine their probative value.

In *Cole v. Hebb*, (1834) 7 G. & J. (Md.) 20, 27, it is said that evidence tends to prove a fact "when a rational common sense intellect might draw from it the conclusion to which by its production it was desired to lead the jury"; or, evidence which tends to prove an ultimate fact is such as will support a verdict rendered thereon, for it is said in *Cummings v. Helena Co.*, (1902) 26 Mont. 434; 68 Pac. 852, "that which the evidence tends to show must be taken as proved" upon a motion for nonsuit.

It is clear, therefore, that when an affidavit to disqualify a judge is presented, he is entitled, and it is his duty, to pass upon its legal sufficiency and to determine whether or not the facts and reasons therein set forth *tend to prove* the personal bias or prejudice mentioned in the statute and, if the facts therein stated do not tend to prove that ultimate fact, the affidavit is insufficient.

This is not all, however. In the second place, the judge sought to be disqualified is entitled to determine whether the affidavit has been filed within time and to construe Section 21 of the Judicial Code until the mean-

ing thereof, when settled either in the Supreme Court or by the circuit court of appeals for his circuit, makes the true interpretation thereof no longer a question.

Section 21 of the Judicial Code provides that the affidavit of bias or prejudice "shall be filed not less than ten days before the beginning of the term of the court". What term of court is meant? Is it the term of court at which the case is actually to be brought on for trial, or the first term of court at which it might have been tried? Such questions were acute in days of bygone legislation (*Fisk v. Henarie*, [1892] 142 U. S. 459, 467).

If we assume, however, that the meaning of Section 21 of the Judicial Code is clear, whatever it is, nevertheless as the parties to this action fixed the term at which the cause was to be tried and to pass to a decree, there can be no doubt that this application was not in time. In deciding that the application was not filed in time, and that good cause had not been shown, Judge Van Fleet was acting judicially, for if there is any one subject more than another which involves judicial determination, it is the question when "good cause" has been shown, or has not been shown.

It is clear, therefore, that a judge who sits to hear an application for his own disqualification is engaged in judicial work. The fact that he is under attack (if you please) is simply an adventitious circumstance.

If Congress had been minded to have the question of disqualification of one judge tried by another, it

would have so provided in its legislation. It chose to provide that all questions involved in the application should be determined by the judge sought to be disqualified, and the fact that an attempt is made to disqualify him in the very proceeding before him does not deprive the proceeding of its judicial aspects.

It is obvious that somebody is bound to determine whether the facts stated tend to show personal bias or prejudice, and the Supreme Court has said that that person is the judge sought to be disqualified.

There is nothing in the statute to suggest that the question of the disqualification of a district judge is to be heard and decided by the senior circuit judge. If there were, then he would be called upon, in some cases, to hold that personal bias or prejudice had been made out and, in other cases, that personal bias or prejudice had not been made out. That Congress never contemplated that these matters should be determined by the senior circuit judge is proved by the circumstance, among others, that in districts where there are two district judges one may decide that he is disqualified by a showing of personal bias or prejudice and call in his colleague, and the matter never reach the senior circuit judge.

This argument, however, as it seems to us, is to little purpose, because all discussion is precluded by the determination of the supreme court in *Ex parte American Steel Barrel Co.*, (1913) 230 U. S. 35.

IV.

THE DECISIONS IN THOSE STATES WHERE THE FACTS AND REASONS ARE NOT REQUIRED TO BE STATED RENDER NO ASSISTANCE IN THE INTERPRETATION OF AN ACT OF CONGRESS WHERE FACTS AND REASONS ARE REQUIRED.

During the proceedings before Judge Van Fleet, on April 8, 1916, Mr. How cited four decisions dealing with the laws of Indiana, North Dakota and Oklahoma, where the statute requires a change of judges upon an affidavit that the litigant believes he cannot have a fair trial before the judge presiding.*

These cases may be briefly reviewed, and it is to be noted that each of them involves an appeal from a judgment based upon an order of the trial judge refusing an application for his own disqualification. It is thus to be seen that the error committed was uniformly remedied by appeal and not by mandamus.

Witter v. Taylor (1885), 7 Ind. 110, was an action on a promissory note. A judgment for the plaintiff was reversed because the trial judge erroneously denied an

*The statute so provided when Oklahoma was a territory and the cases from Oklahoma cited by Mr. How are taken from that period. After the admission of the state into the Union, the statute was changed.

In *Lewis v. Russell* (1910), 4 Okl. Crim. App. 129; 111 Pac. 818, the court deals with the present statute of Oklahoma requiring that the affidavit to disqualify a judge set forth "the grounds or facts upon which the claim is made that the judge is disqualified", and says (p. 819):

"The facts upon which the claim of prejudice is made must be set out in the application so that the judge and the other side may know what is claimed and upon what the claim is based."

The court, in dealing with the reasons that led to the enactment of the present statute, and the change from the earlier statute which did not require the affidavit to set forth any facts at all but merely the belief of the affiant that he could not secure a fair trial, said, in speaking of the former statute (p. 819):

"However moderately and justly this power of disqualifying judges may have been exercised before statehood, after the admission of Oklahoma into the Union it was greatly abused", etc.

application for change of judge upon the ground that the judge presiding had been engaged as counsel in the cause.

The court held, quoting from the syllabus:

“If the affidavit for a change of venue, in a civil cause, is in substantial conformity to the statute, the duty of the Court to grant it is imperative. Counter affidavits are not admissible; nor can the personal knowledge of the judge in relation to the facts sworn to, be allowed to affect the application.”

In *State v. Kent* (1895), 4 N. D. 577; 62 N. W. 631, a judgment of conviction of murder was reversed for error in refusing a change of judge.

The statute provided (p. 635, c. 2), “if the accused shall make an affidavit that he cannot have an impartial trial, by reason of bias or prejudice of the presiding judge”, there shall be a change of judges.

It was held that

“on the presentation of an affidavit stating such bias, the right of the accused to have another judge called in to try the case is absolute” (p. 636).

Lincoln v. Territory (1899), 8 Okla. 546; 58 Pac. 730, is a decision by the Supreme Court of the then Territory of Oklahoma, reversing a judgment of conviction in a criminal case upon the ground that *the court erred in refusing a change of judge*.

The syllabus is by the court, and reads as follows:

“Under St. Okl. 1893, § 5138, as amended by Laws 1895, p. 198, where the accused makes affidavit in which it is positively stated that he cannot have a fair and impartial trial, on account of the bias and

prejudice of the presiding judge of the court where the indictment or information is pending, and presents it in proper time to the court, it is sufficient. The affidavit need not set up the facts on which it is based, or reasons for the belief of the affiant as to the bias or prejudice of the judge. *Cox v. U. S.*, 50 Pac. 175, 5 Okl. 701, overruled."

The affidavit of disqualification read as follows (p. 730, c. 2):

"Territory of Oklahoma, Garfield County—ss.: I, Perry B. Lincoln, on oath do solemnly swear that I am the defendant and accused person in this case above entitled, and that I cannot have a fair and impartial trial of this cause before the Hon. Jno. L. McAtee, the presiding judge of this court, by reason of the bias and prejudice of the said Jno. L. McAtee, presiding judge of said court. Perry B. Lincoln. Subscribed and sworn to before me this 8th day of March, 1898. J. C. McClelland, Clerk, by M. A. Alexander, Deputy."

Cox v. United States, (C. C. A., 8th C., 1900) 100 Fed. 293, involved a writ of error to the Supreme Court of the Territory of Oklahoma which had affirmed a conviction in a criminal case notwithstanding a claim by the defendant that he was illegally refused a change of judge.

The Circuit Court of Appeals reversed the case for this assigned error, and said (p. 294):

"The application of the defendant for a change of judge conformed to the requirements of this statute, and the denial of the application by the trial court, and the affirmance of this ruling by the supreme court of the territory, were error. The statute is plain, unambiguous, and mandatory. Our attention has been called to a late opinion of the

supreme court of the territory of Oklahoma—*Lincoln v. Territory*, 58 Pac. 730—in which that court construes the section of the statute we have quoted, and holds, and rightly, as we think, that when the accused makes affidavit that he cannot have a fair and impartial trial, by reason of the bias and prejudice of the presiding judge, it is the duty of the court to order a change of judge, to be effected in the mode provided by the statute, and that a refusal to do so is an error fatal on appeal to any judgment the court may thereafter render against the defendant in the cause.”

These cases do not assist in the determination of the questions involved here, and it is to be remembered in reading decisions of state courts respecting mandamus that those decisions are generally referable to a supervisory power over inferior tribunals which is not possessed by the federal courts, as we have already shown.

In addition to this, the affidavit required in some of the states, as in Indiana, North Dakota and, until recently, Oklahoma, gives less scope for judicial determination than an affidavit required by a statute such as Section 21 of the Judicial Code, and there would be more argument for holding that such statutes automatically disqualified the judge than there would be where he was called upon to decide a number of questions clearly judicial in character.

In other words, Section 21 of the Judicial Code requires a litigant to show facts which would authorize a finding of personal bias or prejudice, whereas in the states mentioned all that the litigant is required to do is to say that he believes he cannot have a fair

trial. It is the difference between facts tending to show and mere naked and unsupported belief.

Finally, even in those states where the facts and reasons are not required to be stated, an order refusing a change of judges is generally reviewed upon appeal and not by mandamus.

V.

IN VIEW OF THE MOTION SUBMITTED BY THE PETITIONER TO JUDGE VAN FLEET MARCH 6, 1916, FOR AN IMMEDIATE DECREE OF FORECLOSURE, WHICH IS STILL UNDER ADVISEMENT, AND IN VIEW OF THE PROCEEDING IN MANDAMUS TO COMPEL JUDGE VAN FLEET TO GRANT THAT MOTION BROUGHT IN THIS COURT MARCH 10, 1916, AND HERE MAINTAINED BY PETITIONER UNTIL DECIDED MARCH 29, 1916, THE PETITIONER WILL NOT BE PERMITTED TO EXECUTE A VOLTE-FACE BY ATTEMPTING TO PROHIBIT JUDGE VAN FLEET FROM DOING WHAT IT THUS SOUGHT TO COMPEL HIM TO DO.

The preparations for an attempted disqualification of Judge Van Fleet were under way March 18 to 20, 1916 (Pet., p. 61; also Mr. How's testimony April 7, 1916, p. 94—see p. 15 ante), and were completed by the execution of Mr. Rhoades's affidavit in New York, March 29, 1916, before the petitioner or Mr. Rhoades was aware of the decision of this court handed down that day (p. 13 ante). *Indeed, Mr. Rhoades's affidavit was in all probability executed and mailed before the decision of this court was handed down, for the hour at which it was handed down was 5 p. m., New York time.*

In this connection it is to be noted that the resolution of the reorganization committee requesting that Judge Van Fleet be disqualified was adopted March 20, 1916 (Pet., p. 63).

The question is, therefore, presented whether a litigant can be prosecuting proceedings to compel a judge to act and, at the same time, have in preparation proceedings to prohibit him from acting by disqualifying him.

The case against the petitioner, however, is much stronger than as thus stated. The only occurrences assigned in the affidavit of March 29, 1916, to support the charge of personal bias and prejudice against Judge Van Fleet are (a) the occurrences on or before June 30, 1915, on which day the argument to enjoin the dependent suit in New York was concluded; (b) the opinion handed down and order made February 21, 1916; (c) the occurrences of March 6, 1916, and (d) the occurrences in this court upon the oral argument March 16th and 17th, 1916. If Judge Van Fleet had manifested any bias or prejudice against the petitioner prior to March 6, 1916, the petitioner should not that day have submitted to him a motion for the immediate entry of a decree in foreclosure, involving a determination (a) whether or not an upset price was proper, and (b) if such an upset price were proper, what the amount should be. The petitioner had a long time to think it over. Everything that it relies upon for disqualification down to that date had occurred prior to June 30, 1915, except the handing down of the opinion of February 21, 1916, and, as we shall have occasion to show

later, that circumstance cannot be relied upon as a fact or reason to support a charge of bias or prejudice.

It was conceded by Mr. How (in the proceedings of April 8, 1916, p. 154) that the application immediately to enter a decree of foreclosure had been submitted to Judge Van Fleet and that at the very moment of the filing of the affidavit on April 3, 1916, it was pending before him for determination.

The language used by Mr. How is as follows:

“Mr. How. Now, it is said that there is a motion pending before this court. There is. The mandamus applied for was a mandamus to this judge and to this court, and it is my attitude, which I hope I have made clear, that although that motion is pending before this court it is *not now pending before this judge.*”

In other words, Mr. How claimed that the filing of the affidavit on April 3, 1916, divested Judge Van Fleet of control over the motion, but that up to that moment the application (upon the initiative and maintenance of the petitioner) was before him for determination.

This concession brings the matter within that portion of the decision in *Ex parte American Steel Barrel Co.* (1913) 230 U. S. 35, which said, in speaking of Section 21 of the Judicial Code (p. 44):

“It was never intended * * * to paralyze the action of a judge *who has heard the case, or a question in it*, by the interposition of a motion to disqualify him *between a hearing and a determination of the matter heard.*”

Of course, the matter was heard if it was under submission, because the fact that the hearing consisted of a stipulation of the parties that the motion submitted

should be granted does not alter the fact that it was a hearing.

So much for the motion made by the petitioner on March 6, 1916.

The next step took place on March 10, 1916, when the petitioner filed in this court its application for mandamus, the prayer whereof read in part as follows (p. 14):

“Wherefore your petitioner prays that a rule may be made and may issue from this Honorable Court directing Honorable William C. Van Fleet, Judge of the District Court of the United States for the Northern District of California to show cause before this court why a writ of mandamus shall not issue commanding him and it and each of them to proceed with all convenient speed to a hearing of said cause, * * * to the entry of the decree of foreclosure and sale in the form heretofore as hereinabove set forth submitted to said court by your petitioner * * *.”

At the time of the filing of that petition for mandamus the petitioner was well aware of all that had transpired on March 6, 1916, and if the occurrences of that day, coupled with all that had gone before, tended to show personal bias or prejudice against the petitioner, the petition in mandamus to compel the entry of the decree should never have been brought.

The petition, however, was filed, and a return day set. The argument in this proceeding and others occurred on March 16 and 17, 1916. If anything happened on either of these days in the presence of this court which could be drawn upon as a fact or reason tending to show personal bias or prejudice in Judge Van Fleet, the petitioner was well aware of it on

March 17, 1916, when the proceedings were submitted for decision, and should have withdrawn its petition.

Instead of that, the petitioner filed four briefs in the proceedings then submitted, viz., on March 20, 23, 24 and 28, 1916, and it never indicated to this court that it did not wish the petition for a writ of mandamus granted; it did not indicate that it wished to have it withdrawn, and it is, therefore, in the position of having maintained that petition in this court until it was decided March 29, 1916, at 2 p. m., California time. Before that hour of decision arrived, the affidavit relied upon to disqualify Judge Van Fleet had been executed in New York and mailed to California.

We say that, considering all of these circumstances, it is not now proper for the petitioner to maintain a proceeding to prohibit Judge Van Fleet from determining the matters which it sought, uninterruptedly from March 6, 1916, to March 29, 1916, to compel him to determine.

VI.

IT IS INCONCEIVABLE THAT THE PETITIONER WOULD HAVE BEEN PERMITTED TO DISQUALIFY JUDGE VAN FLEET IN THE MATTER OF ENTERING AN APPROPRIATE DECREE OF FORECLOSURE IF THIS COURT HAD ON MARCH 29, 1916, IN TERMS COMMANDED HIM TO PROCEED IMMEDIATELY SO TO DO, AND, AS THAT WAS THE ORDER OF THIS COURT IN SUBSTANCE AND EFFECT, ALTHOUGH NOT IN TERMS, THE POSITION OF THE PETITIONER IS THE SAME.

The opinion of this court handed down March 29, 1916, is summarized at pages 9 to 11 of this brief, and in that opinion this court determined (a) that the

parties to the suit were entitled to the decree in conformity with their motion of March 29, 1916; (b) that in its discretion the court had full power to fix an upset price, and, finally, (c) that the petition for mandamus would not in terms be granted because there was every presumption that the District Court, "being advised of the views of this court will proceed to give the parties full measure of relief".

If this court had in terms directed a peremptory writ of mandate to issue in accordance with the views which it expressed in the opinion, is it conceivable that the petitioner would have been permitted to nullify such a writ of mandamus (procured upon its own petition) by inaugurating a proceeding for the disqualification of Judge Van Fleet on account of matters which occurred before the writ was issued, and which they knew long before the handing down of the opinion and, indeed, before the commencement of the proceeding in mandamus?

We submit that it would not be permitted to do so in the event supposed, and that it will not be permitted to do so in the circumstances as they actually occurred.

VII.

IT WILL BE APPROPRIATE TO A FULL UNDERSTANDING OF THIS PROCEEDING TO CONSIDER IN THE ABSTRACT:

(a) THE QUESTION OF UPSET PRICE, AND (b) THE DUTIES OF A TRUSTEE OF A BOND ISSUE.

(a) The question of upset price.

The fixing of an upset price in many cases is absolutely vital to the protection of minority bondholders.

If a railroad property is foreclosed and its reputed value is far below the amount of the bond issue, there is no hope of getting an outside purchaser except through negotiation with the majority bondholders. In other words, the majority bondholders determine whether they will themselves buy the property or suffer an independent purchaser to buy it. This being the case, no sale of the property is possible except to the majority bondholders or to someone bidding by their procurement or with their consent. Unless, therefore, minority bondholders are protected by the court by an upset price or through an order setting aside a sale for a grossly inadequate price, there is no protection whatever for the minority bondholder.

If it be said that the minority bondholder can join the majority, the answer is that he may not desire and ought not to be compelled to do so. If an investor buys railroad bonds at, say, 92, and the bonds fall into default, the minority bondholder is entitled to realize *in cash* his pro rata of a fair selling price of the property, and it is the duty of a court of equity to protect him in that right.

When an investor purchases bonds he assumes that he is obtaining commercial paper of the highest quality, and he ought not to be forced against his will to take stock in a reorganized company *if the property has any value whatever*.

We very well appreciate that properties may come under foreclosure which have no fair selling value and where the reorganization has been brought about to hold the property for the benefit of the bondholders

until it has a selling value of some amount. It rarely happens, however, that property under foreclosure has no selling value whatever. We may illustrate this with what Mr. Bowie said in his argument on March 16, 1916 (p. 82), when speaking for and of the reorganization committee:

“And we calculated, I believe, that if the Western Pacific were sold for somewhere between \$15,000,000 and \$20,000,000, on the basis on which the securities of that road are selling today, *and the basis on which the road is earning to-day*, we would be entitled to a judgment against the Denver for somewhere between \$20,000,000 and \$25,000,000 in a lump sum; that is, a judgment for a lump sum for damages for breach of their contract of guarantee, because we would not have to wait for each installment, but we could obtain all the relief in an equitable action.”

Let us, therefore, suppose a road with a first-mortgage bond issue of \$50,000,000 and a property worth, we shall assume, at least from \$15,000,000 to \$20,000,000. How is a court of equity to secure such a bid except by fixing an upset price? If no upset price is fixed and the majority bondholders should bid in the property at, say, \$1,000,000, would a court of equity not set aside the sale; and, if it would set aside the sale for gross inadequacy of selling price, should it not in advance fix an upset price fair to the majority and the minority alike?

(b) The duties of a trustee of a bond issue.

We all know that the trustee of a bond issue is generally selected (a) by the mortgaging company or by the proprietors of that company, or (b) by the bankers or capitalists who engage to buy or float the issue. It

is true that when a trust company becomes the trustee of a bond issue it thereby assumes a duty to *all the bondholders*. We know that in trust deeds it is provided that the trustee shall be obliged to take specified action when requested by the holders of a given percentage of the outstanding bonds, and we also know that that percentage is frequently made so high as to make concerted action on the part of the minority bondholders impossible. There is reason in making it the mandatory duty of a trust company to respect the wishes of the holders of a given percentage of the bond issue, because the bondholders and not the trust company bought the bonds. No complaint, therefore, could be made of a trust company which obeyed the directions of a majority of the bondholders as against the protest of a minority, in those matters in which it was provided that the rule of the majority should prevail.

All this, however, is but introductory to the proposition which we are approaching, and that is, that in the reorganization of bankrupt enterprises the majority bondholders often organize to become the purchaser of the property at foreclosure, and when they do so, they do or may come into conflict with the views and interests of the minority. In that case a controversy ensues. The majority, however, in the case supposed, are not to be considered as bondholders but as purchasers, and in such an instance the trustee cannot obey the majority bondholders as proposed purchasers, for the moment that it does so it comes into conflict with the interests of the minority bondholders and ceases to represent *all* the bondholders because it cannot represent the majority as purchasers seeking a low upset price and the minority as vendors seeking a high upset price.

We do not say (because we have not fully considered the question) that the trustee is bound to stand aloof from any reorganization of majority bondholders organized for the purpose of acquiring the property, but we are free to say that it may be imprudent for a trustee to identify itself with reorganization plans. If, however, the trustee does align itself with the majority and becomes a part of a syndicate for the purchase of the property at foreclosure, it becomes impossible for it to have any position in respect of the upset price except that of the majority bondholders, whose position, however, is not that of bondholder but of intended purchaser.

In the event supposed, therefore, the trustee *as trustee* would have no interest in the fixing of an upset price, which would be fair as between the majority as proposed purchasers and the minority claiming the right to realize a pro rata of the fair selling price of the foreclosed properties.

With these preliminary observations we pass to to our next point.

VIII.

THE PETITIONER HAS NO SUCH SUBSTANTIAL INTEREST IN THE QUESTION OF THE UPSET PRICE AS WOULD JUSTIFY AN APPLICATION UPON ITS PART IN ITS CAPACITY AS TRUSTEE TO DISQUALIFY JUDGE VAN FLEET FROM HEARING AND DETERMINING THAT QUESTION.

The only question involved in entering a decree of foreclosure here is that of an upset price, and the petitioner has no such substantial interest in that question

as would justify a proceeding by it to disqualify Judge Van Fleet.

In *Estate of Whitson* (1886), 89 Mo. 58; 1 S. W. 125, the widow in an estate sought a change of judges upon the ground of prejudice, but her application was denied. In affirming the action below, it was said:

“This application might well have been refused on the ground that the *person making it had no interest to be affected* either by the approval or disapproval of the report of sale.”

In *Omaha Co. v. O'Neill* (1890), 81 Iowa 463; 46 N. W. 1100, suit was brought against a judgment creditor and the sheriff to prevent a sale of property under execution. The sheriff attempted to procure a change of venue which was refused on the ground that he had no personal interest in the action.

The theory which underlies Section 21 of the Judicial Code is that the litigant who seeks to disqualify the judge has a question pending before him into the decision of which his bias or prejudice may enter. It is important, therefore, in every case, to ascertain whether the litigant is *interested* in a question before the judge, the proper disposition of which may be affected by the bias or prejudice of that judge.

We are, therefore, called upon now to consider what is the question in which the petitioner is interested and how the bias or prejudice of Judge Van Fleet will affect the disposition of that question. It is clear that the only question is that of upset price. How is the

petitioner interested in that question? In the proceedings of March 6, 1916, Mr. How said (pp. 4, 5, ante) :

“Mr. How. I also ought to call attention to the fact that *there is a blank in the form of decree* presented to the court, or rather, suggested to the court, and covered by the motion which has been made, *for the fixing of an up-set price*. In that regard I do not think that I ought to refrain from saying that my conception of *the duty of the trustee is to take absolutely no part as to the up-set price which this court may see fit to set*, excepting that it holds itself liable to furnish the court such information as it may for the aid of the court. *The only suggestion that I think the trustee is entitled to make with any propriety is that the up-set price shall not be put at such figure as will make a sale impossible, as will not produce a bidder. What that figure is, I do not know.*”

It would seem from the foregoing, considering (a) that the majority bondholders as proposed purchasers of the property desire a low upset price, and (b) that the minority bondholders wish to get a high upset price, that the position of the trustee, as Mr. How suggested on March 6, 1916, is necessarily advisory and not litigious.

This, however, is not all that Mr. How has said on the question of upset price. In the argument made by him in this court March 16, 1916, Mr. How said (tr. p. 12), when speaking of the occurrences before Judge Van Fleet on March 6, 1916:

“The solicitor for the plaintiff—myself—then moved the court that a decree of foreclosure and sale in the form submitted should be entered forthwith; and, in the alternative, and if that motion should be denied, that the cause be set for hearing

and for the entry of such decree at such early day as the court should assign. The reason for the alternative motion was that the parties to the stipulations did not assume to fix the up-set price, if an up-set price should be desirable, in the decree. That obviously is a matter in the discretion of the court and which we did not seek to deprive it of. If the court thought it was a proper case for an up-set price—and *I should think he would not think it was*—the alternative motion left it open to him to set the cause for hearing for the purpose of determining the up-set price which he would demand.”

It was in this same argument of March 16, 1916, (tr. p. 82), that Mr. Bowie made the statement which we have already quoted but which we here repeat:

“And we calculated, I believe, that if the Western Pacific were sold for somewhere between \$15,000,000 and \$20,000,000, on the basis on which the securities of that road are selling today, and the basis on which the road is earning to-day, we would be entitled to a judgment against the Denver for somewhere between \$20,000,000 and \$25,000,000 in a lump sum; that is, a judgment for a lump sum for damages for breach of their contract of guarantee, because we would not have to wait for each installment, but we could obtain all the relief in an equitable action.”

We come now to Mr. Rhoades's affidavit, made March 29, 1916. Speaking of the bonds represented by the reorganization committee, Mr. Rhoades says in his affidavit (Pet. p. 26):

“It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that

the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization.”

Mr. Rhoades also says (Pet. p. 31):

“It is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered,—no more and no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders.”

In connection with the upset price, Mr. Rhoades also says (Pet. p. 30):

“In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge if he were permitted to pass upon the matter *would have to determine and fix the up-set price to be named in said decree*, that is to say the minimum amount for which the mortgaged property may be sold under such decree.”

We now come to April 3, 1916, when Mr. Rhoades's affidavit was filed.

After the affidavit had been read to Judge Van Fleet, the following occurred:

“Mr. How. Your Honor, I have no further duty to perform and cannot be of any more assistance to the Court.

Mr. MADISON. If your Honor please, the Savings Union Bank & Trust Company has up this morning an amended petition for leave to intervene here for the purpose of being made a party to the record for the purpose of introducing evidence in order to aid the Court in arriving at an up-set price. As I understand it, the only point now before this Court at the present time, assuming that the Circuit Court of Appeals' opinion is final will be the signing of a decree and fixing an up-set price. The plaintiff in the case admits that there should be an up-set price fixed, and the affidavit so recites. All the parties to the case agree that there should be an up-set price——

Mr. How. *Don't claim that I am bound by any such statement as that. I don't admit it. I don't think it is a proper case for an up-set price, never have and shall not to the end. I think the Court has the power to fix an up-set price.*

Mr. MADISON. The proposed decree drawn up by Mr. How and submitted by Mr. How on behalf of the Equitable Trust Company contains a provision providing for an up-set price and simply leaving a blank for the amount to be filled in. Am I correct about that, Mr. How?

Mr. How. Quite correct.

Mr. MADISON. And at the time this matter was presented Mr. How said he thought it was a proper case for an up-set price. He had nothing to say however upon that point.

I think this is a case where an up-set price should be fixed and I would be glad to argue that point at the proper time. There is no objection, as I can see, to the form of the decree and nothing before the Court but the fixing of the up-set price."

It is evident that Mr. Rhoades and Mr. How are at cross purposes in respect of the question of an up-set price. Mr. Rhoades says that it is the duty of the Trust Company "to compel the majority bondholders

to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered—no more and no less—and this duty the Trust Company is prepared and intends fully to perform”, while Mr. How says “I don’t think it is a proper case for an upset price, never have and shall not to the end.”

During the hearing before Judge Van Fleet on April 7, 1916, frequent reference was made to Mr. How’s remark of March 6, 1916:

“My conception of the duty of the trustee is to take absolutely no part as to the up-set price which this court may see fit to set” (p. 5, ante).

On April 8, 1916 (p. 153), Mr. How made the following comment:

“Mr. How. Will the court permit me a very few minutes? I seldom attempt to explain any misapplication or misconstruction of any remarks that I have made if the record shows that it is a misapplication and a misconstruction. But in this case there has been such a persistent lack of fair representation of some remarks that I have made that I think I ought to claim the privilege of explaining them.

I did say that it was my conception of the functions of the Trustee that it should not take any part in the fixing of an upset price so long as the price was fixed so that it might obtain a bidder and effect a sale and complete the remedy which it sought. I made that on page 705 of the transcript of the record. At page 725 there appears a minority bondholder with a big stick, with an affidavit claiming that the property is worth \$40,000,000 and putting the trustee, in its judgment if that should be accepted, in a position where it would be impossible

to obtain a bidder, and putting it also in a position where it would have to protect a part of the bondholders against assault on the part of others. From that moment the Equitable Trust Company had a positive duty as Trustee to see, as it expresses in its affidavit, that the property should be sold for what it was economically worth, all factors of value being considered and all qualifications upon that value being considered."

We think we have thus stated all that has been said by the petitioner in respect of its duties and interests as trustee concerning an upset price.

Considering that the majority bondholders are organized to buy the property at the lowest possible price against the interests of the minority bondholders who are seeking to get the highest possible upset price, we think that the trustee, as trustee, has no position whatever in the matter, regarding it as a mere question of abstract law.

Considering the facts, it would seem to be clear that if the trustee, standing aloof, is entitled to enter the controversy as a third interested party (counting the majority bondholders and the minority bondholders as two) nevertheless it has abandoned that possibility by becoming identified with the reorganization committee. Mr. Alvin W. Krech is the president of the petitioner (Case No. 2755, Exhibit 4, p. 121), and Mr. Lyman Rhoades is not only a vice-president of the company but as that officer of the petitioner has charge of this very litigation (p. 13, ante). At the same time, Mr. Krech is the chairman of the reorganization committee and Mr. Rhoades is its secretary (Case No.

2755, Exhibit 26). Thus, the president and the vice-president of the Trust Company, whose duty it is (according to Mr. Rhoades's affidavit) to compel the majority bondholders "to pay the full and true value of the property at the time of sale", are also the chairman and secretary of the reorganization committee, and represent the majority bondholders whose interest it is (according to Mr. Rhoades's affidavit) "to obtain the mortgaged property for the lowest possible price".

It is clear, therefore, that by its own voluntary and deliberate act, the Trust Company has become identified with the reorganization committee and that it cannot claim to represent the minority bondholders in fixing the upset price. What interest, then, has it in the matter of the fixing of the upset price? Is it to oppose the minority that they may not succeed in procuring too high an upset price, or is it to oppose the majority that they may not procure too low an upset price or no upset price at all?

We say the position of the trustee as trustee is to do neither the one nor the other. If abstractly it had no duty but to stand aloof, nevertheless it has so shaped its course as to make it obligatory in law that it be deemed and treated as a litigant allied with the majority bondholders and against the minority bondholders in the matter of the upset price. In this aspect of the case we submit it is in no position *as trustee* for *all* the bondholders to challenge the fairness of Judge Van Fleet, or his capacity fairly to hear and determine the questions relating to an upset price.

The trust deed so providing, it was a perfectly legitimate exercise of power for the majority bondholders to give the trustee directions in respect of its course

(including an attempt to disqualify Judge Van Fleet) in respect of (a) proceedings to bring in the Denver & Rio Grande and Missouri Pacific, etc., and (b) the prosecution of the dependent suit in New York; and, in obeying the directions of the majority bondholders in these matters, the trustee would be deemed to represent *all* the bondholders. In other words, in the case supposed, what was to the interest of *all* the bondholders would be deemed to be properly determinable by the majority bondholders, because the trust deed so provided.

In respect of the upset price, however, the case is entirely different. *The majority bondholders, so far as the upset price is concerned, are to be regarded as a proposing purchaser only.* The fact that this proposing purchaser is a majority of the bondholders is an adventitious circumstance.

Considering the matter from this aspect, the proposing purchaser has no authority to instruct the trustee to take a position in respect of the upset price in accordance with the desires of the proposing purchaser and against the interest of the minority bondholders. In such a case, the majority bondholders cannot possess the power of decision not only for themselves but for all other bondholders as well, for, the majority bondholders being the proposing purchaser and the minority bondholders desiring a high upset price, their interests clash.

Ordinarily, in such a contingency the trustee would stand neutral, but in the present case the trustee has become identified with the majority bondholders in their

role as proposing purchaser. Under these circumstances, it will not be regarded as being even neutral, but must be ranged and identified in interest with the proposing purchaser.

Under these circumstances, it is impossible for it in its capacity as trustee, and claiming to represent *all* the bondholders, to move the court for the disqualification of the judge as a measure necessary to secure justice to it *as trustee*, representing *all* the bondholders.

IX.

MANDATE SHOULD BE DENIED UPON THE GROUND THAT THE PETITIONER ABUSED THE PRIVILEGE GIVEN BY SECTION 21 OF THE JUDICIAL CODE BY FILING AN AFFIDAVIT IN RESPECT OF ISSUES WHICH DID NOT EXIST WHEN THE AFFIDAVIT WAS FILED.

This affidavit was based upon the continued existence of the controversies in this case which were under advisement in this court at the time of the making of the affidavit. When the opinion of this court came down, those controversies became obsolete. The affidavit is based largely upon the existence of those controversies and upon the allegations of the petitioner therein contained that the controversies were subsisting when, in point of fact, at the time of the filing of the affidavit the petitioner knew, and it was the fact, that those controversies had ceased to exist. Under the circumstances, it was highly improper to file such an affidavit because it was in large part irrelevant. This will be seen by a reference to paragraph III of the affidavit (Pet. pp. 21-23).

It has been frequently decided that the inclusion of matter wholly irrelevant and immaterial in an affidavit to disqualify a judge constitutes contempt.

See:

In re Jones (1894), 103 Cal. 397;

Works v. Superior Court (1900), 130 Cal. 304;

Lamberson v. Superior Court (1907), 151 Cal. 458;

Webb v. Superior Court (Cal. App. 1915), 152 Pac. 957.

If, therefore, this affidavit, as we contend, is made up, in large part, of matter irrelevant to the state of facts which existed when it was filed, that is a sufficient reason for rejecting the application both below and here.

See:

Board of Supervisors v. Supervisor (1892), 94 Mich. 386; 54 N. W. 169, 170;

Bashore v. Superior Court (1907), 152 Cal. 1, 3;

United States v. Fisher (1911), 222 U. S. 204.

X.

INASMUCH AS THIS APPLICATION WAS NOT MADE WITHIN THE TIME SPECIFIED IN SECTION 21 OF THE JUDICIAL CODE IT BECAME NECESSARY FOR THE PETITIONER TO SHOW CAUSE FOR THE DELAY, AND IF THERE BE ANY CONCEIVABLE THEORY ARISING FROM THE FACTS WHICH WOULD JUSTIFY A JUDGE IN HOLDING THAT GOOD CAUSE FOR THE DELAY WAS NOT SHOWN, THE PETITION FOR MANDAMUS MUST BE DENIED.

We think that this proposition is self-evident, and that under the facts which we have heretofore discussed

any judge would be justified in holding that good cause had not been shown for failure to act within the time specified in Section 21 of the Judicial Code.

As we shall see later, practically all of the matters dealt with in the affidavit, save occurrences in the District Court February 21, 1916, and March 6, 1916, and in this court March 16 and 17, 1916, transpired on or before June 30, 1915, and Mr. How, counsel for the petitioner, knew thereof as and when they occurred (Pet. p. 59).

It is held in *Crosby v. Blanchard* (1863), 89 Mass. (7 Allen) 385, that "an objection that a judge is not impartial must be taken at the trial *if then known to the counsel who conducts the case; otherwise neither he nor his client can afterwards take advantage of it*", and this decision is cited with approval in *Coltrane v. Templeton* (C. C. A., 4th C., 1901), 106 Fed. 370, 377, and *Utz Co. v. Regulator Co.* (C. C. A., 8th C., 1914), 213 Fed. 315, 319.

XI.

IN CONSIDERING MR. RHOADES'S AFFIDAVIT IT IS TO BE REMEMBERED THAT THE RIGHT TO MAKE AN APPLICATION TO DISQUALIFY A JUDGE IS WAIVED BY FAILURE TO ACT PROMPTLY.

White v. Jouett (1912), 147 Ky. 197; 144 S. W. 55, 60;

Tolliver v. Commonwealth (1915), 165 Ky. 512; 176 S. W. 1190;

- German Insurance Co. v. Landram* (1889), 88 Ky. 433; 11 S. W. 367;
- Massie v. Commonwealth* (1892), 93 Ky. 588; 20 S. W. 704;
- McDonald v. Wallsend* (1909), 135 Ky. 624; 117 S. W. 349;
- Louisville Ry. v. Mitchell* (1910), 138 Ky. 190, 192; 127 S. W. 770;
- Pittsburgh Ry. v. Austin's Administrator* (1911), 141 Ky. 722, 725; 133 S. W. 780, 784;
- Nicholls v. Barrick* (1900), 27 Colo. 432, 439; 62 Pac. 202;
- Everville v. Leadville Co.* (1901), 28 Colo. 241; 64 Pac. 200, 201;
- State v. Clifford* (1911), 65 Wash. 313, 316; 118 Pac. 40, 41;
- Ingles v. McMillan* (1911), 5 Okl. Crim. 130, 143; 113 Pac. 998, 1003;
- Yazoo R. R. v. Kirk* (1912), 102 Miss. 41, 55; 58 So. 710, 713;

See also

- Washoe Copper Co. v. Hickey* (1912), 46 Mont. 363; 128 Pac. 584;
- Hutchinson v. Manchester Ry.* (1905), 73 N. H. 271; 60 Atl. 1011, 1014;
- Coltrane v. Templeton* (1901), (C. C. A., 4th Ct.), 106 Fed. 370.

XII.

THE RECEIVERS AND THEIR COUNSEL ARE NOT PARTIES WITHIN SECTION 21 OF THE JUDICIAL CODE; AND IN VIEW OF THE MATTERS DISPOSED OF BY THIS COURT MARCH 29, 1916, THEY COULD NOT BE SAID TO HAVE BEEN PARTIES WITHIN THE THEORY OF MR. RHOADES'S AFFIDAVIT.

In Mr. Rhoades's affidavit it is claimed not only that Judge Van Fleet has a personal bias and prejudice against the petitioner but that he has also a bias and prejudice in favor of the receivers and their counsel.

The affidavit proceeds upon the theory that there were controversies between the petitioner, on the one hand, and the receivers and their counsel, on the other, in respect of (a) the prosecution of the dependent suit; (b) the bringing in of the Denver & Rio Grande and the Missouri Pacific Companies, and (c) the immediate entry of a decree.

The controversy in respect of the immediate entry of the decree depended upon the validity of the order of February 21, 1916.

The entire affidavit, therefore, shows that the only controversies sought to be stated in the affidavit were the controversies dealt with in the order of February 21, 1916; and inasmuch as that order had been annulled by this court in its opinion of March 29, 1916, all controversies with the receivers and their counsel mentioned in the affidavit came to an end before the filing of the affidavit on April 3, 1916.

It could not properly have been said that the receivers and their counsel were ever parties to the controversy, but, if they had been in the abstract, the con-

troverſy terminated and there was no matter between them and the Trust Company for adjudication when the affidavit was filed.

In the proceedings of March 6, 1916, Mr. How perſiſtently maintained the poſition that the receivers were not parties (Case No. 2757, Petition Exhibit 24, p. 5 middle, p. 13 foot), and this was followed up by a ſimilar and ſucceſſful contention in this court, reſulting, as it did, in a holding by the court that they were not parties.

This ſhould diſpoſe of all the matters in the affidavit predicated upon the idea that the receivers and their counſel were parties to the action or to any controverſy therein.

XIII.

THE SAVINGS UNION BANK AND TRUST COMPANY IS NOT A PARTY TO THE ACTION.

The Savings Union Bank and Trust Company filed a petition for leave to intervene March 16, 1916, and this petition has never been granted.

Under theſe circumſtances, the Savings Union Bank and Trust Company cannot be regarded as a party to the action.

Indeed, it is the theory of the petitioner that the Savings Union can and ſhould be heard in reſpect of the upſet price *without permitting it to become a party to the cauſe*, for it is ſtated in Mr. Rhoades's affidavit (Pet. p. 40):

“On ſaid 6th day of March, 1916, after the application for ſaid decree, * * * ſaid Savings Union applied for leave to be heard concerning

the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause.”

XIV.

IN CONSIDERING THE LEGAL SUFFICIENCY OF THE AFFIDAVIT OF MR. RHOADES, WE ARE TO DISMISS (a) MATTERS ALLEGED UPON INFORMATION AND BELIEF; (b) MATTERS THEREIN STATED IN POSITIVE FORM, IF IT APPEAR IN TERMS BY THE AFFIDAVIT ITSELF THAT HE HAD NO PERSONAL KNOWLEDGE IN RESPECT THEREOF; (c) MATTERS THEREIN STATED IN POSITIVE FORM, IF IT APPEAR BY FAIR INFERENCE FROM OTHER FACTS STATED IN THE AFFIDAVIT ITSELF THAT HE HAD NO PERSONAL KNOWLEDGE IN RESPECT THEREOF; (d) MATTERS THEREIN STATED IN POSITIVE FORM, IF IT BE SHOWN DEHORS THE AFFIDAVIT THAT THEY RELATE TO MATTERS OF WHICH MR. RHOADES HAD NO PERSONAL KNOWLEDGE; (e) STATEMENTS THEREIN RESPECTING RECORDS AND PROCEEDINGS IN COURT IN SO FAR AS THOSE RECORDS AND PROCEEDINGS CONTRADICT THE STATEMENTS OF THE AFFIDAVIT; AND, LASTLY, (f) FACTS WHICH RELATE TO AN IMPUTED BIAS AND PREJUDICE IN RESPECT OF THE CONTROVERSIES AS CONTRADISTINGUISHED FROM A PERSONAL BIAS OR PREJUDICE RESPECTING THE LITIGANT.

We shall dwell upon these matters very briefly.

(a) **Matters alleged upon information and belief.**

See:

Schmidt v. Mitchell (1897), 101 Ky. 570; 41 S. W. 929, 934;

Gay v. Torrance (1904), 145 Cal. 144, 150;

Crouch v. Dakota Co. (1904), 18 S. D. 540; 101 N. W. 722;
Davis v. Atkinson (1905), 75 Ark. 300; 87 S. W. 432, 433;
White v. Jouett (1912), 147 Ky. 197; 144 S. W. 55;
People v. Ford (1914), 25 Cal. App. 388; 143 Pac. 1075, 1077.

- (b) Matters therein stated in positive form, if it appear in terms by the affidavit itself that Mr. Rhoades had no personal knowledge in respect thereof.

See:

Cook v. De La Garza (1855), 13 Tex. 431;
Crowns v. Vail (1889), 51 Hun 204;
Hodgman v. Barker (1891), 60 Hun 156;
Ferris v. Commercial Nat. Bank (1895), 158 Ill. 237;
James E. Pepper Dis. Co. v. Alexander (1907), 137 Ill. App. 369;
 2 Cyc., 24.

- (c) Matters therein stated in positive form, if it appear by fair inference from other facts stated in the affidavit itself that Mr. Rhoades had no personal knowledge in respect thereof.

See cases in the preceding paragraph.

- (d) Matters therein stated in positive form, if it be shown dehors the affidavit that they relate to matters of which Mr. Rhoades had no personal knowledge.

Although there is no authority to the point that it will be fatal to an affidavit to disqualify a judge if it

be shown by evidence dehors the affidavit that the matters therein stated in positive form were not within the personal knowledge of the affiant, nevertheless we believe this to be a sound and a true rule. It is within the philosophy which underlies the rules that we have already invoked, and in their logical extension this should be declared to be the law.

- (e) **Statements therein respecting records and proceedings in court, in so far as those records and proceedings contradict the statements of the affidavit.**

See:

16 Encyc. Pl. & Pr., 566;
People v. Shaw (1852), 13 Ill. 582.

- (f) **Facts which relate to an imputed bias and prejudice in respect of the controversies, as contradistinguished from a bias or prejudice personal to the litigant.**

Estate of Dolbeer (1908), 153 Cal. 652, 656, holds that opinions acquired in the course of litigation in respect of the merits of the controversies involved cannot give rise to a claim of personal bias or prejudice.

See also:

Western Bank of Scotland v. Tallman (1862), 15 Wis. 92, 94;
Conn v. Chadwick & Co. (1880), 17 Fla. 428, 440;
Bent v. Lewis (1884), 15 Mo. App. 40, 44;
Purvis v. Frink (1908), 55 Fla. 715; 46 So. 171, 172;
McDonald v. Wallsend Co. (1909), 135 Ky. 624; 117 S. W. 349;
State v. Superior Court (1914), 82 Wash. 420; 144 Pac. 539.

XV.

A CAREFUL ANALYSIS OF MR. RHOADES'S AFFIDAVIT WILL SHOW THE FACTS AND REASONS STATED BY HIM DO NOT SUPPORT THE CLAIM THAT JUDGE VAN FLEET HAS ANY PERSONAL BIAS OR PREJUDICE AGAINST THE PETITIONER OR IN FAVOR OF THE RECEIVERS OR THEIR COUNSEL OR THE SAVINGS UNION.

Mr. Rhoades's affidavit takes up forty-four pages of the record (Pet., pp. 19-64).

In analyzing the allegations which bear upon the alleged personal bias or prejudice of Judge Van Fleet it is important to keep in mind a number of dates, as follows:

- (a) March 2, 1915, this action was commenced;
- (b) March 3, 1915, the receivers were appointed;
- (c) March 8, 1915, Mr. Partridge was appointed counsel for the receivers;
- (d) March 26, 1915, the petitioner filed its ancillary bill in New York;
- (e) May 27, 1915, the petitioner brought its ancillary dependent action in New York;
- (f) June 10, 1915, Judge Van Fleet made an order requiring the petitioner to show cause why the dependent suit should not be dismissed or its prosecution stayed, and restrained the prosecution of the suit in the meantime;
- (g) June 28 to 30, 1915, arguments were made upon this matter and upon the propriety of making the Denver & Rio Grande a party defendant;

(h) December 6, 1915, counsel for the petitioner filed its brief resisting the proceeding which had been argued June 28 to 30, 1915;

(i) December 20, 1915, counsel for the Denver & Rio Grande Railroad, appearing as *amicus curiae*, by permission of court filed a brief on the same matter;

(j) December 24, 1915, counsel for the reorganization committee handed Judge Van Fleet a copy of the plan of reorganization;

(k) December 27 to 31, 1915: In reply to the brief of counsel for the Denver & Rio Grande, appearing as *amicus curiae*, two briefs were filed; one by Mr. Partridge on December 27, 1915, and one by Mr. How on December 31, 1915. On the last named day, the matters which had been argued June 28 to 30, 1915, were submitted for decision;

(l) February 21, 1916, order was made staying the prosecution of the dependent bill, and bringing in the Denver & Rio Grande and Missouri Pacific Companies as parties defendant;

(m) March 6, 1916, application was made to Judge Van Fleet immediately to enter decree of foreclosure;

(n) March 6, 1916, application to this court for prohibition, restraining the order bringing in new parties, and alternative writ issued returnable March 16, 1916;

(o) March 9, 1916, appeal taken from order restraining prosecution of dependent suit in New York;

(p) March 10, 1916, petition for mandamus to compel immediate entry of decree;

(q) March 13, 1916, Savings Union filed its petition for leave to intervene, following its oral application of March 6, 1916.

(r) March 16 and 17, 1916, argument of three proceedings before this court and their submission for decision;

(s) March 18, 1916, Mr. Rhoades arrived in San Francisco, having left New York on the 14th;

(t) March 18 to 20, 1916, Mr. Rhoades engaged in preparing affidavit for disqualification;

(u) March 20, 1916, reorganization committee requested trustee to disqualify Judge Van Fleet;

(v) March 20, 1916, Judge Van Fleet announced that he would take no steps in the case until this court decided the matters under submission;

(w) March 20, 1916, Mr. Rhoades left for New York;

(x) March 29, 1916, Mr. Rhoades made his affidavit and mailed it to San Francisco;

(y) March 29, 1916, this court handed down its decision;

(z) April 3, 1916, affidavit to disqualify Judge Van Fleet filed.

With these dates before us we proceed briefly to consider the facts and reasons set forth by Mr. Rhoades, and we ask the court in reading the affidavit to keep in mind Point XIV, in which the authorities are collected which require that certain stated matters be retired from consideration.

We also ask the court in reading the affidavit, to keep in mind paragraph III of Mr. Rhoades's affidavit where he sets forth the matters which are pending in this court, and because of which he desires the disqualification of Judge Van Fleet (Pet., pp. 21, 23), and to contrast the controversies thus set forth in Mr. Rhoades's affidavit made March 29, 1916, with the matters which were in controversy on April 3, 1916, as they are stated in the body of the petition herein (Pet., p. 16, top). With these matters in mind it will not be difficult, though it is somewhat laborious, to give proper consideration to the matters set forth in Mr. Rhoades's affidavit. This we proceed to do.

We shall deal with these matters, not as they are arranged in the affidavit but as nearly as possible, in chronological order.

(a) Alleged bias and prejudice against petitioner.

1. On March 1, 1914, and September 1, 1914, Judge Van Fleet's wife and children owned nine bonds (p. 32). These were disposed of about a week before the commencement of this action (p. 33).

The trustee knew when it filed this bill that on March 1, 1914, and again on September 1, 1914, nine bonds (taking Mr. Rhoades's affidavit as true) were owned by the judge's wife and children, because the income tax certificates made that known to it.

Whether it was also aware when it commenced this action that those bonds had been sold, we cannot know because the affidavit does not so state, but we presume that it did.

Considering that the trustee and its counsel (because we assume that its counsel had like information) knew thirteen months before the filing of the disqualifying affidavit that these bonds had been held and sold, and considering that Judge Van Fleet so stated in open court June 29, 1913 (Pet., p. 32), why was that fact introduced into the disqualifying affidavit? Presumably, to connect the circumstance with the allegation (p. 34, foot) that the "holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds"; in other words, to show a grievance against the Denver Company, and an attempt to tie the Denver Company to the reorganization committee, and to identify the trustee with that committee. This, we suggest, is far-fetched, and, considering that the controversies involving the Denver Company fell out of this litigation before the filing of the affidavit, the allegation should be dismissed altogether.

2. The sister-in-law of Judge Van Fleet holds three bonds which she owned before the commencement of the action.

When the petitioner learned of this fact is not stated, but we presume it learned of it about March 1, 1914, or September 1, 1914.

This allegation was introduced for the same reason as the one just dealt with, and deserves the same treatment.

3. March 3, 1915 (precisely thirteen months before the filing of the disqualifying affidavit), Judge Van Fleet refused to appoint Mr. Olney sole receiver, but appointed him and Mr. Frank G. Drum as joint receivers.

Can judicial action of that nature be made the predicate of personal bias or prejudice?

4. March 8, 1915, Judge Van Fleet appointed Mr. Partridge counsel for the receivers (pp. 37-38), although he "had formerly been a partner in the firm of which said Partridge is a member", and although his son was and is "an attorney employed by *and associated with* said Partridge in his private practice".

What is meant by these statements? Judge Van Fleet while at the bar had been a partner in a law firm and, after he had ceased to be a member of that firm, Mr. Partridge became a member of it. This is the allegation. Is any deduction to be drawn from it?

Let us next take the allegation that his son was "an attorney employed by *and associated with* said Partridge".

Of course, if Judge Van Fleet's son was employed by Mr. Partridge he was associated with Mr. Partridge. A careful examination of the allegation shows that it means only that he was employed by Mr. Partridge. We assume that that was all that was meant, but the language might suggest that the relation was not one of mere employment, which is all that is directly alleged.

This was known to the petitioner for a year. Mr. How testifies (Proceedings April 7, 1916) that he knew it from the first day he went to Mr. Partridge's office because Mr. Van Fleet's name is upon the door (Proceedings April 7, p. 96), and, in terms, he admitted and conceded, for the purposes of the examination, that he had known it at least six months (p. 97).

5. We come now to the commencement of the dependent suit May 27, 1915. This was ten months before the disqualifying affidavit was filed.

The allegations are (in positive form, although Mr. Rhoades was in New York) that the judge "displayed resentment at the Trust Company's action in commencing the same without his permission" (p. 28); that Frank G. Drum, receiver, and John S. Partridge, counsel, were greatly disturbed by the commencement of the dependent suit and regarded the same as an affront to the judge and themselves; that the judge and counsel for receivers have "on several occasions, reiterated and emphasized" that the dependent bill was brought without permission of the judge and without authority from him (p. 30), and that Mr. Rhoades is "informed" and "verily believe [s], that said judge suspects and resents the conduct of the Trust Company in instituting said New York suit".

As there is a stenographic account of what was said, which was offered in evidence in the proceedings below, and as it appears from it that there is no warrant for these statements of Mr. Rhoades (most of them in positive form, and the last one on information and belief),

we submit that they should be dismissed from consideration.

6. On June 10, 1915, the judge, of his own motion, issued an order to show cause why the prosecution of the dependent suit should not be enjoined, etc. (p 28), and shortly afterwards refused the application of counsel for the reorganization committee to modify the restraining order and order to show cause unless consented to by counsel for receivers, but said that if counsel for the receivers consented thereto, he would modify the restraining order (pp. 54-55).

7. June 28, 29 and 30, 1915, Mr. Partridge argued that the Denver Company should be brought in and an equitable lien fixed upon its property (pp. 39, 56).

8. On February 21, 1916, Judge Van Fleet expressed the opinion that the Denver Company should be made a party and its obligations enforced in the present suit (p. 36). Speaking of this order, Mr. Rhoades says, that between December 24, 1915, when counsel for the reorganization committee handed a copy of the reorganization plan to Judge Van Fleet, until February 21, 1916, neither trustee nor reorganization committee had any idea that there would be opposition to the plan (p. 48); also that counsel for the reorganization committee requested that the entry of the order of February 21, 1916, be delayed so there might be a showing of consequences, but this the judge peremptorily refused (p. 50). Mr. Rhoades adds: "I am convinced" that Judge Van Fleet acted "with the desire that the plan of reorganization should be defeated," and he "is personally opposed

thereto" (pp. 52, 53), and he also says Judge Van Fleet identifies the Trust Company with the reorganization committee and believes it is a partisan of the plan and of the bondholders who joined therein, etc. (p. 53).

Mr. Rhoades's affidavit proceeds upon the idea that the trustee and reorganization committee were taken by surprise by the making of the order of February 21, 1916; but they had argued the matter with Mr. Partridge exhaustively in June, 1915 (pp. 39, 56), and the briefs had not been handed in until December, 1915, so that they must have expected a decision would come down one way or the other. Indeed the trustee submitted two briefs to Judge Van Fleet, December 6 and 31, 1915.

The order of February 21, 1916, and the opinion which Judge Van Fleet gave speak for themselves, although this court has said that he erred in the conclusion that he reached. His opinion, however, shows that he dealt with the matter in a manner quite in keeping with the duty of a judge. It is also said that in his opinion and order of February 21, he enjoined the petitioner from the enforcing of the obligations of the Denver Company in any court except in the District Court for the Northern District of California (p. 29), but if his view of the situation had turned out to be correct, such an order would have been the logical consequence of his judicial determination.

One other question remains to be spoken of in connection with the order of February 21, 1916, and that is whether, if the Denver Company had been brought in,

its liabilities were to be established before or after the decree of foreclosure. Mr. Rhoades states that he was "advised by counsel" (pp. 49 and 50), that if the Denver Company were brought in its liabilities could be established after decree of foreclosure just as well as before, and that although this is the fact according to the advice of his counsel, nevertheless, on February 21, 1916, there was "an intimation *although not very distinct*", that said judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure to be entered therein. These are all matters which Judge Van Fleet dealt with in the course of the performance of his judicial duty. They cannot be assigned as the predicate for personal bias and prejudice.

(9) March 6, 1916, Judge Van Fleet refused immediately to enter a decree "without hearing counsel for the receivers" (p. 38). When Mr. Partridge appeared he opposed the entry of the decree until the obligation of the Denver Company should have been adjudicated and if possible enforced (p. 39), and the Savings Union appeared and asked to be heard regarding the fixing of the upset price (p. 40). Mr. Rhoades says that Judge Van Fleet continued the order for one week in order, as he said, to permit the receivers to be heard. In point of fact, all that occurred is set forth in case No. 2757, Exhibit 24, and speaks for itself. Also, Judge Van Fleet refused to enter the decree until this court decided the prohibition proceeding, and stated in effect "that if jurisdiction was upheld he would not direct the entry of any decree until the matter of the bondholders' claim against said Denver Company should be

disposed of by him'' (p. 51-52), and also that on the same day he refused to enter an order denying the motion for an immediate decree although counsel asked him to do so for the purpose of laying the foundation of a mandamus by them to compel him to do so (p. 52). In this connection, however, it is to be remembered Judge Van Fleet said that if the Circuit Court of Appeals decided the prohibition contrary to his view he was ready to proceed and enter the decree. At any rate, all of this matter was stenographically reported and it was laid before this court in case No. 2757 and speaks for itself.

In connection with the proceedings of March 6, 1916, Mr. Rhoades quotes language used by Judge Van Fleet (pp. 24, 25) and says that he thereby "clearly implied" that the trustee was not acting for all the bondholders; and Mr. Rhoades furthermore says that Judge Van Fleet "identifies the Trust Company with the reorganization committee"; also, he says it appears from a colloquy of March 6, 1916, that Judge Van Fleet regards the Trust Company as in reality not acting for the minority bondholders but as representative solely of the majority bondholders (p. 24).

10. March 8, 1916, Mr. Partridge upon the advice of Mr. McEnerney refused to facilitate the hearing of the appeal from the order enjoining the prosecution of the dependent bill (pp. 15, 43).

11. March 13, 1916, Judge Van Fleet made an order that the receivers be authorized and directed to appear

respecting the appeal in Case No. 2756, and to protect the jurisdiction of the District Court (p. 43).

12. March 16 and 17, 1916, during the argument before this court, "said judge, through his counsel" alleged and claimed that the action of the trustee in maintaining the dependent bill was a contempt of court and "has in effect, by the order of said judge, been adjudged so to be in contempt" (p. 29); at the same time, "said judge and said counsel *clearly intimated*" that the judge, receivers and counsel believed that the dependent suit was brought for the purpose of evading jurisdiction, and therefore "the Trust Company and the majority bondholders are unwilling to confide their interests under said contract to the decision of said judge" (pp. 29-30); also at the same time, "counsel for said judge, by innuendo, plainly intimated" that the trustee "was and is in collusion with the Denver Company", and made remarks about the Denver & Rio Grande, which are quoted (p. 35); also at the same time, counsel for Judge Van Fleet resisted mandamus upon the ground that it was not proper considering the application of the Savings Union for leave to amend, and the clear implication of the argument was that the application ought to be and would be granted by the judge on account of unfairness and partiality in the administration of the trust, etc. (p. 41); and moved to dismiss the appeal (p. 44), and tried in various ways to prevent a decision upon the merits (pp. 44-45), and counsel for Judge Van Fleet cooperated with counsel for the Savings Union despite the charges of fraudulent

conspiracy made by counsel for the Savings Union (p. 42); also counsel for Judge Van Fleet "clearly intimated in argument" that the trustee "could not be trusted, in the opinion of the judge, to act fairly and impartially" between the two groups of bondholders (p. 25).

In other words, every step taken by counsel is thus sought to be imputed to the judge.

This is contrary to all authority.

See:

1 *Enc. Ev.* 468;

Treadway v. S. C., Etc., R. Co. (1875), 40 Ia. 526;

Davidson v. Gifford (1888), 100 N. C. 18; 6 S. E. 718;

Browning v. Lovett (1906), 29 Ky. L. Rep. 692; 94 S. W. 661.

13. We have thus brought the allegations of the affidavit down to March 16 and 17, 1916. The following day Mr. Rhoades arrived in San Francisco, and he spent the 18th, 19th and 20th making preparation for the disqualifying affidavit. March 20, 1916, the reorganization committee, presumably in New York, passed its resolution asking that Judge Van Fleet be disqualified. Later, on the 20th, 23d, 24th and 28th the petitioner filed its briefs in this court on the matters which had been submitted on the 17th.

14. We come now to those allegations and statements in the disqualifying affidavit for which no date is given.

Mr. Rhoades says, "As will appear hereinafter, said Judge constituted himself the special guardian and champion of said minority bondholders" (p. 32). This is not a fact, but a phrase. Moreover, it merely sums up other matters which we have already noted.

Mr. Rhoades also says, "I am convinced and believe that * * * he entertains a deep resentment against said Denver Company"; that he believes the charges of the Savings Union against the three banking houses, and also that the reorganization committee and trustee are co-operating with them (p. 45); that he believes also "that the Trust Company intends (although such is not its intention) to endeavor to secure an unduly low upset price to be fixed by the decree herein" (p. 45).

(b) Alleged bias and prejudice in favor of receivers and their counsel.

Paragraphs XIV and XV of Mr. Rhoades's affidavit are intended to support the charge that there is a bias in favor of the receivers and their counsel (pp. 53-56), and practically all that is said in that regard is that Judge Van Fleet frequently refused to make the orders asked by the petitioner unless counsel for the receivers consented, saying at the same time that if counsel for the receivers did consent, he would make such orders. In this same connection Mr. Rhoades speaks of Frank G. Drum as "one of the especially trusted representatives and confidential advisers of said Judge" (p. 57). There is nothing to show who informed him of this, and the whole affidavit negatives the idea that he had any personal knowledge of it.

(c) Alleged bias and prejudice in favor of the Savings Union.

Paragraph XVI of the affidavit (pp. 56-58) is given over to the facts and reasons to support the charge of personal bias or prejudice in favor of the Savings Union, and in connection with these facts it is said that counsel for Judge Van Fleet argued before this court March 16, 1916, that the pendency of the application for intervention of the Savings Union was good reason for denying mandamus, that they co-operated with counsel for the Savings Union, that they did not resent the charges of fraud and bad faith against the company, and that neither they nor Judge Van Fleet protested against the charges.

(d) Reasons offered for failure to file the affidavit in time.

Paragraph XVII of the affidavit is devoted to the reasons for petitioner's failure to file it in time (Pet. pp. 58-63).

The facts and reasons are altogether insufficient and, in that connection, we again call attention to the fact that it is held in *Crosby v. Blanchard* (1863), 89 Mass. (7 Allen) 385, that "an objection that a judge is not impartial must be taken at the trial *if then known to the counsel who conducts the case; otherwise neither he nor his client can afterwards take advantage of it;*" and that this decision is cited with approval in *Coltrane v. Templeton* (C. C. A., 4th C., 1901), 106 Fed. 370, 377, and *Utz Co. v. Regulator Co.* (C. C. A., 8th C., 1914), 213 Fed. 315, 319.

XVI.

**THE STATEMENT THAT JUDGE VAN FLEET WILL DETERMINE
MR. PARTRIDGE'S COMPENSATION IS SET FORTH FOR THE
FIRST TIME IN THE PETITION VERIFIED BY MR. HOW AT
PORTLAND ON APRIL 10, 1916.**

The petition drawn by Mr. How and verified by him at Portland April 10, 1916, two days after Judge Van Fleet determined that the disqualifying affidavit was neither sufficient nor timely, contains the following allegation to show the "controversies" before Judge Van Fleet (Pet. p. 16):

"Said Judge intends to and will in said proceeding fix and determine the up-set price for which the said property is to be sold; that said Judge will also pass upon and determine the question of the right of the petitioner, Savings Union Bank & Trust Company, to intervene in said cause. Said Judge will also in said cause pass upon and determine the compensation to be paid to John S. Partridge, counsel for the receivers and counsel for the said Judge, as herein stated."

Until Mr. How verified the petition April 10, 1916, a controversy over the compensation to be paid to Mr. Partridge had not even been suggested, much less presented to Judge Van Fleet, as a reason for his disqualification. Indeed, in the form of decree presented to Judge Van Fleet March 6, 1916, it is expressly provided that the claims of the receivers and their counsel shall be paid by the purchasers of the property, and it is clear, therefore, that the trustee is not interested in the matter (p. 4, ante).

XVII.

CONCLUSION.

It is respectfully submitted that mandamus be denied.

Dated, San Francisco,

May 6, 1916.

GARRET W. McENERNEY,

JOHN S. PARTRIDGE,

Counsel for Respondent.

IN THE
United States Circuit Court of Appeals
 FOR THE
 NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE
 EQUITABLE TRUST COMPANY OF NEW
 YORK, AS TRUSTEE, FOR A WRIT OF MAN-
 DAMUS, TO BE ISSUED AND DIRECTED TO
 THE HONORABLE WILLIAM C. VAN FLEET,
 JUDGE OF THE UNITED STATES DISTRICT
 COURT, FOR THE NORTHERN DISTRICT
 OF CALIFORNIA, SECOND DIVISION.

ARGUMENT FOR PETITIONER.

MURRAY, PRENTICE & HOWLAND,
 37 Wall St., New York,
 JARED HOW,
 Mills Building, San Francisco,
 Attorneys for Petitioner.

Filed this.....day of May, 1916.

....., Clerk.

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
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IN THE MATTER OF THE PETITION OF THE
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THE HONORABLE WILLIAM C. VAN FLEET,
JUDGE OF THE UNITED STATES DISTRICT
COURT, FOR THE NORTHERN DISTRICT
OF CALIFORNIA, SECOND DIVISION.

ARGUMENT FOR PETITIONER.

STATEMENT OF THE CASE.

This argument is submitted upon the return to an order, made by this Court under date April 17, 1916, upon the petition of The Equitable Trust Company of New York, as Trustee, directing Honorable William C. Van Fleet, Judge of the District Court of the United States for the Northern District of California, to show cause, if any there be, why the said petition should not be granted and why the writ of mandamus, as therein prayed, should not be issued, commanding him to cause an authenticated copy of an affidavit of personal bias and prejudice theretofore filed in an action then pending before him and to be tried and heard before him to be certified forthwith

to the senior circuit judge then in the circuit for such proceedings as are provided by law.

Section 21 of the Judicial Code provides:

“Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.”

Section 20 of the Judicial Code, the section last preceding Section 21, provides:

“Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so re-

lated to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

Section 14 of the Judicial Code provides:

"When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein."

The petition pursuant to which the order to show cause was issued shows the following facts:

On the 29th day of March, 1916, there was pending in the District Court of the United States for the Northern District of California before Honorable William C. Van Fleet, one of the judges of said Court, a suit brought by this petitioner, The Equitable

Trust Company of New York, as Trustee, as plaintiff, against Western Pacific Railway Company and others, as defendants, for the foreclosure of the First Mortgage of Western Pacific Railway Company and for the appointment of receivers for the property covered by such First Mortgage *pendente lite*, in which action John S. Drum and Warren Olney, Jr., had been appointed and were acting as such receivers and John S. Partridge had been appointed and was acting as counsel for such receivers.

Upon said 29th day of March, 1916, there was also pending in said Court, and in said cause, a petition of Savings Union Bank and Trust Company, for leave to intervene in said cause.

Upon the 3rd day of April, 1916, there was filed in said cause by The Equitable Trust Company of New York, the plaintiff therein, an affidavit of Lyman Rhoades, one of the vice-presidents of said Trust Company, therein stated to have been made for and on behalf of such Trust Company, as such plaintiff, and pursuant to a resolution of its Executive Committee passed upon consideration of a report made to it by said Rhoades of the facts set forth in such affidavit, requesting and directing that such affidavit be made by said Rhoades and filed in said cause.

Such affidavit set forth that said Honorable William C. Van Fleet, the judge before whom such action of The Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company

and others was pending and was to be heard, had a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause, a personal bias and prejudice against said The Equitable Trust Company of New York, as Trustee, and as plaintiff in said cause, a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company, appointed in said cause, and John S. Partridge, their counsel, who had by their actions, recited in such affidavit, and under the authority, or with the acquiescence, of said judge, become parties to various controversies which had arisen in said cause, and to which said Trust Company was also a party, and a personal bias and prejudice in favor of Savings Union Bank and Trust Company which had sought to intervene in said cause.

Such affidavit also stated at considerable length the facts and the reasons for the belief that such bias and prejudice existed, and, not having been filed not less than ten days before the beginning of the term of the Court, which began on the 6th day of March, 1916, showed good cause for the failure to file it within that time.

At the foot of such affidavit said Lyman Rhoades as the authorized officer of and in behalf of said The Equitable Trust Company of New York, the plaintiff in such action, prayed that said judge, Honorable William C. Van Fleet, should proceed no further in

said cause, or in any matter arising therein, and that another judge should be designated therefor, in the manner by law prescribed, and that said Honorable William C. Van Fleet should cause the fact of the filing of such affidavit and application to be entered on the records of the court and also an order that an authenticated copy thereof should be forthwith certified to the senior circuit judge for this Ninth Circuit then present in the circuit, for such further proceedings as are prescribed by law.

The affidavit and application were accompanied by a certificate of Jared How, counsel of record in said action for The Equitable Trust Company of New York, as Trustee, that such affidavit and application were made in good faith. A copy of such affidavit and application and of the certificate of counsel accompanying the same are attached to the petition in this proceeding (Record, page 19).

At the time of filing such affidavit, that is to say, at forty minutes past nine o'clock in the forenoon of said 3rd day of April, 1916, counsel in said action for The Equitable Trust Company of New York presented to the Clerk of the District Court of the United States for the Northern District of California, in whose office such affidavit was so filed, a form for an order, entitled in said cause, and in the usual form, directing that the fact of the filing of such affidavit should be entered on the records of the court, and that an authenticated copy thereof should be forthwith certified

to the senior circuit judge for this circuit then present in the circuit, and requested said clerk to take forthwith such affidavit and such form for an order to said judge, Honorable William C. Van Fleet, in chambers. A copy of such form for an order is attached to the petition herein (Record, page 64).

Said judge, upon the presentation of such affidavit to him by said clerk, refused to receive or consider the same, and directed said clerk to state to counsel for the Trust Company that proceedings in the matter of such affidavit and application must be taken in open court.

In accordance with such requirement of said judge in that regard, counsel for the Trust Company, at the opening of said court at ten o'clock in the forenoon of said 3rd day of April, 1916, suggested to said judge, Honorable William C. Van Fleet, that said affidavit had been filed in said action of The Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company and others, and that, pursuant to the provisions of Section 21 of the Judicial Code, said judge could take no further proceedings in said action, and submitted to him said form for an order required by the provisions of the Judicial Code to be made in the premises.

The judge then requested counsel for said Trust Company to read such affidavit; and said counsel, although protesting that the practice prescribed by the Judicial Code did not require that such affidavit should be read by him in open court, consented to

read and did read the affidavit in full, together with the certificate of counsel accompanying it; and, upon the completion of such reading, again suggested to the judge the procedure prescribed by the Judicial Code and again submitted to him such form for an order in conformity with the provisions thereof. Thereupon the judge caused the further consideration of the matter to be continued to and until ten o'clock in the forenoon of the 5th day of April, 1916.

Upon the opening of court on said 5th day of April, 1916, said judge declared that if he should determine either upon his own judgment or upon the advice of counsel with which his judgment might concur that said affidavit "is of legal sufficiency to give rise to prejudice such as the statute contemplates," then he should proceed to certify the fact to the senior circuit judge; but if, on the other hand, he should determine that it is not legally sufficient, then it would be his duty to ignore the affidavit and refuse to enter any such record as would be required if he were called upon by reason of the character of the affidavit to certify it to the circuit judge.

The judge at that time further declared that he was entitled to the advice of counsel and therefore had requested Garret W. McEnerney, Esq., and John S. Partridge, Esq., representing him personally, to give him their judgment; and that a request made by them for further time was reasonable, and that he should grant it. And thereupon, over the objection of counsel

for the Trust Company, and notwithstanding his protest that the plain and right meaning of Section 21 of the Judicial Code is that said judge was then, because of the filing of said affidavit, foreclosed from further proceeding with the cause, and that further proceeding means, not only such proceeding as is pertinent to the relief prayed in the bill of complaint, but, as well, proceeding in the matter of said affidavit and application, because said application was made in the cause and is a proceeding in the cause, the judge ordered that the matter of the consideration of such affidavit and application should stand over to and until two o'clock in the afternoon of the 7th day of April, 1916.

A transcript of the proceedings before said judge in the matter of said affidavit and application upon the 3rd day of April, 1916, is annexed to the petition herein (Record, page 65); and a transcript of such proceedings on the 5th day of April, 1916, is likewise attached to such petition (Record, page 127).

Upon the calling of the matter of said affidavit and application for further consideration at two o'clock in the afternoon of said 7th day of April, 1916, said judge, over the objection of counsel for the Trust Company thereto, caused to be read his verified answer to said affidavit, which answer had theretofore been filed in the cause. Such answer denied the existence of any bias or prejudice of said judge either against The Equitable Trust Company of New York, the plaintiff in said action, then pend-

ing before him, or against said The Equitable Trust Company of New York, as Trustee and as plaintiff in said cause, or any bias or prejudice in favor of either Frank G. Drum or Warren Olney, Jr., as Receivers of the Western Pacific Railway Company, appointed by him, or in favor of their counsel John S. Partridge, or in favor of Savings Union Bank and Trust Company, the petition of which to be allowed to intervene in said cause was then and is still pending therein. It also denied various of the statements contained in such affidavit and especially such as were of conclusions drawn by the affiant from matters which were set forth at length in the affidavit.

In such answering affidavit of said Honorable William C. Van Fleet, so filed and caused to be read in open court by said judge, it was declared:

“That it is the intent of the affiant to proceed forthwith, and with all possible expedition, to the hearing of any further matters that may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale, and winding up of the receivership;

“That affiant is satisfied in the state of his own mind that affiant, in all matters and things in connection with said action, can and will, and intends to, do equal and exact justice to all parties who may be interested therein.”

Thereafter, said judge, likewise over the objection of said counsel for The Equitable Trust Company of New York, and upon further hearing of said matter, allowed to be filed and read in said proceeding

an affidavit of John S. Partridge, a copy of which is annexed to the petition herein (Record, page 161); and permitted the counsel appointed by him, and theretofore stated by him to be representing him personally, to introduce in said proceeding a considerable amount of evidence and to make extended arguments, not only upon the merits of the Rhoades affidavit, but, as well, upon the propriety, from the viewpoint of honesty, of the manner of the performance by the Trust Company of its duties as trustee and as plaintiff in the main action, an example of which is set forth in the petition (Record, page 10).

At the conclusion of such hearing said judge gave orally his opinion and decision in which he refused to cause an authenticated copy of such affidavit to be certified to the senior circuit judge then present in the circuit. Such opinion and decision are set forth in full in an amendment to the petition herein.

The petition herein shows further that said judge, Honorable William C. Van Fleet, intends to and will, in said action of The Equitable Trust Company of New York, as Trustee, against Western Pacific Railway Company and others, fix and determine the up-set price for which the mortgaged property may be sold under foreclosure; and pass upon and determine the question of the right of Savings Union Bank and Trust Company to intervene therein; and pass upon and determine the compensation to be paid to John S. Partridge, counsel for the Receivers and for said judge personally.

The petition further shows that a Plan and Agreement has been framed for the carrying out of which holders of approximately \$43,900,000 par value of First Mortgage bonds of the Western Pacific Railway Company have joined and holders of approximately \$2,500,000 of such bonds have agreed to co-operate; that such Plan and Agreement contemplates the purchase at foreclosure sale of all the mortgaged properties, in the interest of all such holders of such First Mortgage bonds as shall be willing to participate therein, and the issue by the purchaser forthwith of \$20,000,000 par value of bonds to be secured by a first lien upon the properties so purchased; that, in order that the Plan and Agreement might be carried out, it was essential that a fair market for such bonds, when issued, should be assured; that to that end an underwriting syndicate has been formed and has agreed to ensure the sale of such bonds at a price and upon terms which are believed to be more favorable than can again be secured; that, by the terms of such underwriting agreement, the syndicate is entitled to call for such bonds on or before July 1, 1916; that if, through delay in the entry and enforcement of a decree of foreclosure and sale in said action, it shall become impossible to carry out such Plan and Agreement before said July 1, 1916, such holders of bonds as shall have joined therein will suffer great and irreparable loss; that your petitioner, as Trustee for such bondholders, is without remedy by appeal,

or otherwise than by a writ of mandate out of this court as prayed.

ARGUMENT.

The argument will be made under the following captions:

I.

As to the meaning of Section 21 of the Judiciary Code.

II.

As to whether the provisions of Section 21 of the Judiciary Code are violative of the Constitution of the United States.

III.

As to the sufficiency of the Rhoades affidavit.

IV.

As to whether the affidavit shows good cause for not filing it within the time limited by Section 21 of the Judiciary Code.

V.

As to whether Mandamus will lie.

I.

AS TO THE MEANING OF SECTION 21 OF THE JUDICIAL CODE.

a.

In Section 21 of the Judicial Code the Congress has said that

“Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter. . . . Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists . . . and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.”

The rule of first importance in construing statutes is that

“the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. . . . No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.”

Mr. Justice Brewer in *United States vs. Goldberg*, 168 U. S., at page 102.

Upon the application of this rule, the meaning of this provision of the Judicial Code is established. The language employed by the Congress is clear, direct and entirely unequivocal. It does not say that the actual existence of the bias or prejudice complained of must be shown beyond a reasonable doubt nor even by a preponderance of probability. The prevailing idea of the Congress in enacting the provision was manifestly that in order to be entitled to a change of judge the party applying for it shall merely have reached a conviction that a personal bias or prejudice exists in the mind of the then presiding judge either against him or in favor of an opponent in the case; and that he shall have reached that conviction in good faith; and the reason for the requirement that the affidavit shall state the facts and reasons *for the belief* that such bias or prejudice exists is obviously not that a trial of the facts may be had, but only that the affidavit may itself disclose whether it is made in good faith.

There are many who think that the fact that justice will be rendered through the administration of our laws is not all that those who are subject to them are entitled to; and that a feeling of assurance that justice will be administered is essential to the preservation of the dignity and to the stability of our institutions. Apprehension of a failure of justice at the hands of judges is in slight degree, if any, less harmful than the failure of justice itself; and in many

cases it may well be much more harmful. It is apparent that this provision of the Code was framed with full appreciation of that fact and was not designed solely to prevent unjust and unfair decisions but, as well, to afford relief from apprehension that unjust and unfair decisions would be rendered. Whatever the design of the Congress, however, that is the effect of the provision, if enforced according to the clear meaning of the language employed in framing it. No casuist, however skillful, can render that meaning obscure. In *Henry vs. Speer*, 201 Fed., 869, the Circuit Court of Appeals for the Fifth Circuit has said:

“Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature; that is, it is meant to afford relief from adventitious predicaments which fair-minded men recognize should be relieved against, when they in fact exist. In affording this relief the Congress has expressed itself plainly and perspicuously. It is not difficult to arrive at its true intent and meaning.”

There is, therefore, no need to resort to any extraneous matter for the construction of this provision; but if there were, there is extraneous matter which would be helpful.

b.

The provision of Section 21 of the Judicial Code made its first appearance in federal legislation upon

the adoption of the Code in the year 1911. But prior to that time it had appeared in the legislation of several States and had been construed and applied many times and with almost complete consistency.

The provision appeared in Illinois in the Act of 1845 relating to venue; and was construed in the same year, in *McGoon vs. Little*, 7 Ill., 42, to mean that, upon the filing of the affidavit of prejudice, the judge before whom the case was pending had no discretion whatsoever to refuse the change of venue.

It appeared in Indiana in the Rev. Stat. of 1852 and was construed in the same way, as it applied to civil cases (2 R. S. 1852, p. 74) in *Witter vs. Taylor*, 7 Ind., 110 in 1855, and as it applied to criminal cases (2 R. S. 1852, pp. 370-1) in *Goldsby vs. State*, 18 Ind., 147, in 1862. In that case it appeared that the statute provided for a change of venue in criminal cases for two causes: prejudice of the judge and excitement or prejudice against the defendant in the county; and it provided that

“When the objection is to the judge in an action pending in the Court of Common Pleas, the action may be transferred to the Circuit Court of the county and tried therein”;

and

“When the affidavit is founded upon excitement or prejudice in the county against the defendant, the Court may in its discretion grant a change of venue to the most convenient county.”

In its opinion the Court said:

“When a change is asked on account of excitement or prejudice against the defendant in the county, it is clear that it may or may not be granted, because the matter is left to the discretion of the Court. Not so, however, when the change is asked because of the prejudice of the judge against the accused. In such case, the statute does not provide for the exercise of any discretion by the judge, and perhaps it is well it does not.”

And to the same effect see *State vs. Palmer*, 57 N. W. Rep., 490 (South Dakota, 1894).

We might digress here to call attention to the difference between the procedure provided in Section 20 and that provided in Section 21 of the Judicial Code. Section 20 provides that “Whenever it appears that “the judge of any district court is in any way concerned in interest in any suit pending therein or “has been of counsel or is a material witness for “either party, or is so related to or connected with “either party as to render it improper, *in his opinion*, “for him to sit on the trial, it shall be his duty, on “application of either party,” to cause the matter to be certified to the senior circuit judge to the end that another judge may be designated to hear the matter. It seems to be clear that the fact that Section 20 expressly provides that the setting the procedure in motion is to depend upon the decision of the judge and that Section 21 does not so provide is significant that in Section 21 it was not intended so to provide,

and that the procedure under that section was intended to be set in motion by a purely ministerial act as distinguished from a judicial act of the judge.

The provision in question appeared in the legislation of Wisconsin in 1853 and was construed in the same year (*Baldwin vs. Marygold*, 2 Wis., 419) in the same manner as it had been construed in Illinois; and similar legislation and like construction by the courts was had in Iowa (*Jones vs. Railway Co.*, 36 Iowa, 68, decided in 1872), in North Dakota (*State vs. Kent*, 62 N. W. Rep., 631, decided in 1895), in South Dakota (*State vs. Palmer*, 57 N. W. Rep., 490, decided in 1894), in Minnesota (*State vs. Hoist*, 126 N. W. Rep., 1090, decided in 1910), and Oklahoma (*Lincoln vs. Oklahoma*, 58 Pac. Rep., 730, decided in 1899). The Circuit Court of Appeals for the Eighth Circuit has also, in *Cox vs. United States*, 100 Fed., 293, decided in 1900, construed the Oklahoma statute, and has approved the construction given by the Territorial Court in *Lincoln vs. Oklahoma*.

The rule that statutes adopted by one State after they have been construed in another State are presumed to have been adopted with the construction which had been placed upon them has been applied by the Supreme Court of the United States in the case of statutes adopted by the Congress for territories of the United States (*Robinson vs. Belt*, 187 U. S., 41), and for the District of Columbia (*Capital Traction Co. vs. Hof*, 174 U. S., at page 36); and, by a parity

of reasoning with that of the Court in its opinions in those cases, the Congress must be presumed to have adopted Section 21 of the Judicial Code with the construction placed upon similar statutes by the Courts of States which had theretofore enacted them.

In this particular case the presumption is much strengthened, if not rendered conclusive, by the proceedings of the House upon the adoption of Section 21 (Cong. Rec., Vol. 46, Part I, Dec. 14, 1910, pp. 305-6; and Part 3, Feb. 15, 1911, pp. 2626-2630). This section was moved in the House as an amendment to the Code as it was reported out of the committee and recommended. It was moved by a member from Indiana; and in the discussion preceding the adoption of the amendment, the member from Indiana cited the Indiana statute of similar character and the practice under it in support of his motion for the adoption of the amendment. The Indiana practice has from the beginning been in exact conformity with the earliest decisions of its courts as stated above.

Witter vs. Taylor, supra (1855);
Goldsby vs. State, supra (1862); ..
Manly vs. State, 52 Ind., 215 (1875);
Duggins vs. State, 66 Ind., 350 (1879);
Krutz vs. Griffith, 68 Ind., 444 (1879);
Krutz vs. Howard, 70 Ind., 174 (1880).

c.

It being clear then that the section under consideration means that the judge against whom the affidavit is filed has no power to determine whether the affidavit tends to show bias or prejudice—that is, tends to show it to such extent that it may not be reasonable to consider the claim of the affiant, that he believes that such bias or prejudice exists as asserted, to be spurious—it remains to consider what power, if any, such judge has to determine whether, if the affidavit was not filed not less than ten days before the beginning of the term of the court (and this affidavit was not so filed), good cause is shown in the affidavit for failure to file it within such time.

There is no apparent reason why the determination of the sufficiency of the affidavit and the determination of the sufficiency of the cause for not filing it not less than ten days before the beginning of the term should stand on different bases. If the judge shall proceed to determine either matter, he is violating the prohibition against proceeding further in the suit; because the affidavit is filed and the application is made in the suit, and obviously, if the judge shall determine judicially either that the affidavit is insufficient in substance or that the cause attempted to be shown for not filing it within the time limited is insufficient, he will be proceeding further in the suit.

Moreover, the views which have been expressed in

the opinions of courts against the propriety of permitting the judge to sit in judgment upon a matter in which he is so vitally interested will apply to the determination of the sufficiency of the affidavit upon the merits with equal force as to the determination whether good cause has been shown for not filing the affidavit within the time limited. An example of an opinion of this character is that of the Supreme Court of North Dakota in *State vs. Kent*, 62 N. W., 631, in which it is said:

“The mind that cannot decide that it is biased without at the same time admitting by such decision that it was willing in that condition to enter on the trial of the man against whom the prejudice is entertained, without disclosing such prejudice and bias, and that it would have carried on such trial to its close, conscious that it was not impartial—a man placed in a position where a decision against his own freedom from bias will bring such humiliation—is not that calm, disinterested mind with respect to that question which the law requires and the honest administration of justice demands. This consideration renders it impossible for us to impute to the legislature the purpose to permit the judge so assailed to pass on his own bias.”

The same argument would apply as well against the propriety of permitting the judge to sit in judgment upon a question, the determination of which by him might result in entirely eliminating the charge of prejudice from the record.

It may be contended that if the affidavit shall not

be filed within the time limited or good cause shown why it is not so filed, it will not have been entitled to be filed at all, and that in that event the district judge will not be called upon to proceed as provided by the statute; and that the determination of the question whether the affidavit was entitled to be filed must therefore rest in him. If that be true, his determination must be considered as judicial in character.

But that view of the matter is inconsistent with the opinion of the Supreme Court in the case of *ex parte American Steel Barrel Company*, 230 U. S., 35. In that case, District Judge Chatfield had caused to be certified an affidavit of prejudice to Circuit Judge Lacombe. The Supreme Court said "Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the senior circuit judge whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioner. If in this he made a mistake, it was one made in the course of his legitimate jurisdiction under Section 14 of the New Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done."

It is obvious that the jurisdiction of the senior circuit judge in this proceeding is original and not appellate. It is obvious also that jurisdiction to determine the question whether good cause has been shown for not filing the affidavit within the time limited cannot

exist equally in the district judge and the circuit judge. If, therefore, the circuit judge possesses the power, it cannot also exist in the district judge. In other words, the holding of the Supreme Court that the circuit judge has the power to determine the question necessarily forbids a contention that the district judge has such power.

II.

AS TO WHETHER THE PROVISIONS OF SECTION 21 OF THE JUDICIAL CODE ARE VIOLATIVE OF THE CONSTITUTION.

If this question is serious it has become so because of the opinion of District Judge Jones in the case of *Ex parte Fairbank Co.*, 194 Fed., 978. The opinion was given on the 12th of March, 1912. Since then the provisions of Section 21 have been construed by the Circuit Court of Appeals in the circuit within which Judge Jones resides in the case of *Henry vs. Speer*, 201 Fed., 869 (Jan. 7, 1913), and by the Supreme Court in the case of *Ex parte American Steel Barrel Co.*, 230 U. S., 35 (June 16, 1913). The question of the constitutionality of Section 21 was not mentioned in the opinion in either of these cases, although examination of the briefs of counsel in the Steel Barrel Company case discloses that it was thoroughly argued by both sides.

But the argument that the provisions of Section 21

are in violation of the Constitution is easily disposed of. The opinion of Judge Jones declares:

a. The power to decide upon the facts in a given case that a judge is disqualified to sit in it is judicial.

b. Such power is one of the inherent powers of courts.

c. The real effect of Section 21 is to arm a litigant with this judicial power.

d. The Constitution and laws require the judge to sit in every case in his court unless he is excluded for causes which disqualify him, the existence of which must be declared by some judicial tribunal.

The argument in support of these propositions shows clearly that the disqualification in the mind of the judge is common law disqualification; and the practice which he declares to be essential is that created by the courts where there have been no statutory provisions or where the statutory provisions contemplated judicial determination of the fact of the existence of prejudice. But as was said by the Circuit Court of Appeals for the Eighth Circuit in *In re Nevitt*, 117 Fed., 448, disqualification may be constituted by "Interest in the subject-matter of the litigation, relationship to one or more of the parties to it, and statutory prohibitions." The disqualification in question in this proceeding is not a common law disqualification. It rests upon the statutory provision

prohibiting the judge from proceeding any further in an action pending before him after the affidavit described in the statute has been filed.

“With the exception of the Supreme Court, the authority of Congress in creating courts and conferring on them all or much or little of the judicial power of the United States is unlimited by the Constitution” (*United States vs. Union Pac. Co.*, 98 U. S., at page 603).

And it does not admit of doubt “that the power to “ordain and establish carries with it the power to “prescribe and regulate the modes of proceeding in “such courts” (*Livingston vs. Story*, 9 Peters, at page 656). Congress has power to “parcel out the jurisdiction among such courts from time to time at their own pleasure” (*Martin vs. Hunter's Lessee*, 1 Wheat., at page 331). It also, of course, has power to provide for as many or as few judges as it may see fit and to divide the business of the courts among them as it thinks proper.

The Act of March 2, 1907, provided for the appointment of an additional judge for the Northern District of California and that the senior circuit judge or any circuit judge within the State of California shall make the necessary orders for the division of business and the assignment of cases for trial (34 Stat., 1253). It is apparent that in so dividing the business and assigning cases for trial the circuit judge is not performing a judicial function but only one purely ministerial.

The fact that the act is done by a judicial officer does not make it judicial in character. *Ex parte Virginia*, 100 U. S., at page 348; *People vs. Bush*, 40 Cal., 344. It follows, then, that Congress might have provided rules for the guidance of the circuit judge in the division of business or the assignment of cases without laying its action open to the objection that the legislative department of the government was trespassing upon the province of the judicial department. But that is all that has been done by Section 21 of the Code. It merely provides that whenever an affidavit of the character described shall have been filed in the case the senior circuit judge then in the circuit shall assign the case for trial before some other judge than that before whom the case is then pending. See *State vs. Clancy*, 77 Pac., at p. 317 (Mont.).

We submit that it has been established that the sole power to determine whether the affidavit is sufficient in substance and whether it has been filed in time is for the senior circuit judge after the matter has been certified to him by virtue of the provisions of the Code, and not for this Court; but nevertheless we proceed to a consideration of the questions which may be claimed to arise from the contents of the affidavit itself.

III.

AS TO THE SUFFICIENCY OF THE RHOADES AFFIDAVIT.

The statute provides that the affidavit shall be "that
" the judge before whom the action or proceeding is
" to be tried or heard has a personal bias or prejudice
" either against him or in favor of any opposite party
" to the suit"; and that it "shall state the facts and
" the reasons for the belief that such bias or prejudice
" exists."

The affidavit sets forth, in the exact terms of the statute, the existence of personal bias and prejudice on the part of the judge against The Equitable Trust Company of New York, the plaintiff in said cause, and against said Trust Company, as Trustee, and as plaintiff in the cause, and in favor of the receivers and their counsel who have, under direction of, or with the acquiescence of the judge, become parties to various controversies which have arisen in the cause, to which the Trust Company is also a party, and in favor of Savings Union Bank and Trust Company, the application of which to be allowed to intervene in said cause for the purpose of procuring the fixing in the decree, to be entered in said cause, the largest possible up-set price, is now pending and is opposed by the Trust Company.

It sets forth at much length also the facts and the reasons for the belief of the affiant that such personal bias and prejudice exist. It was said by the Supreme

Court in the American Steel Barrel case, *supra*, that these facts and reasons must be "facts and reasons which *tend to show* personal bias or prejudice" (230 U. S., at page 44). The facts and reasons set forth in the affidavit, and which are believed to tend to show such personal bias and prejudice, consist principally of the following:

1. Prior to the institution of said suit in his court, and from the 1st day of March, 1914, until after the 1st day of September, 1914, various members of the immediate family of said judge were severally the owners in various amounts of First Mortgage bonds of said Western Pacific Company, amounting in the aggregate to approximately \$9,000.00. All of said bonds excepting bonds in the principal amount of \$3,000.00 owned by a sister-in-law of said judge, who is a member of his household, had been disposed of late in the month of February, 1915, approximately one week prior to the commencement of said cause, at which time it was a matter of common knowledge that such cause was about to be commenced in the court of said judge, and in the purchase and sale of such bonds a considerable loss was sustained. Said sister-in-law of said judge is believed to be still the owner of said bonds and has not deposited the same under the Plan of Reorganization of the bondholders of said Western Pacific bonds.

2. At the time of the appointment of receivers in

the suit, the judge was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr., as receiver; but the judge, of his own motion, in order, as he explained, to have as receiver some one with whom he was acquainted and in whom he had confidence, appointed Frank G. Drum as a receiver with Warren Olney, Jr.; and, although it was represented to him that the then existing legal department of the Western Pacific Company was adequate for the discharge of the legal duties incident to the receivership, appointed, as counsel for such receivers, John S. Partridge, who is a member of the firm of which the judge had formerly been a member. The son of said judge was, at the time of the appointment of said Partridge, and still is, in his employment and was associated in practice with him.

3. In May, 1915, The Equitable Trust Company of New York, as Trustee under the First Mortgage of the Western Pacific Company, and at the request of the holders of a majority of the bonds secured by such mortgage, filed in the District Court of the United States for the Southern District of New York its bill by which it sought to enforce the liability of the Denver & Rio Grande Railway Company under what is commonly called Contract B. to pay to the Trust Company, for the benefit of all holders of the First Mortgage Bonds of Western Pacific Railway Company, the difference between the amount due from the Western Pacific Company for interest on

its bonds and for sinking fund requirements under its First Mortgage and the amount actually paid by that Company, and to restrain the individual holders of some of such bonds, which bore an endorsement of direct guaranty of such interest payments by the Denver Company, from enforcing such direct guaranties to the impairment of the obligations of the Denver Company under Contract B. in favor of all holders of such First Mortgage bonds equally.

The Judge displayed resentment against the Trust Company for bringing this suit without his permission and Receiver Frank G. Drum and counsel for the Receivers John S. Partridge stated in substance that the action of the Trust Company in bringing this suit was an affront to the judge and to themselves.

Upon an application to the judge by the Receivers soon thereafter for instructions as to whether they should bring a suit for the enforcement of the said obligations of the Denver Company, the judge, of his own motion, issued an order to the Trust Company directing it to show cause why it should not be restrained from further proceeding in such New York suit; and subsequently rendered an opinion and of his own motion caused an order to be entered enjoining the Trust Company from taking any further proceedings in said suit and from prosecuting such obligation of the Denver Company in any court excepting his court and from taking any action with respect

to the obligations of said Denver Company without his consent.

Subsequently, upon the taking of an appeal from said order, said judge entered an order directing the Receivers to take any steps they might deem necessary to protect the jurisdiction of his court upon said appeal. At that time, counsel for the Trust Company applied to said John S. Partridge, as counsel for said Receivers, to join all other parties to said cause in a stipulation waiving the issuance of citation upon such appeal and consenting that such appeal might be heard on March 16, 1916, together with an application for a writ of prohibition and an application for a writ of mandamus hereinafter referred to; but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said judge and for said Receivers in the matter of said appeal and applications, he refused to do so.

4. Holders of approximately \$43,900,000 principal amount out of \$50,000,000 outstanding of Western Pacific First Mortgage bonds have joined in forming a Reorganization Committee and adopting a Plan and Agreement for the reorganization of the Railway Company, and the holders of approximately \$3,000,000 principal amount of such bonds other than those held by persons who have joined in such Plan and Agreement are represented by a committee which has acted in co-operation with said Reorganization

Committee. All holders of such bonds have been and are at liberty to join in said Plan and Agreement. The Trustee, pursuant to a provision of such First Mortgage, and as in duty bound to do, is receiving and obeying instructions from said Reorganization Committee as representing the holders of a majority in amount of said bonds; but has not received any instructions or taken any proceedings which operate to the advantage of one set of bondholders as distinguished from another. The judge, however, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said Plan and as acting solely for the bondholders who have joined therein.

5. On the 6th day of March, 1916, counsel for the Trust Company applied to said judge, pursuant to a stipulation of all parties to the action, including the only creditors who claimed any right of preference over, or any right to share equally with, said bondholders, for a decree of foreclosure and sale in said action. Upon the making of such application said judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon it without hearing counsel for the Receivers; and said in that connection:

“The Court is responsible for the administration of this property. Its avenue of aid and of enlightenment is not only counsel for the respective parties, but the counsel for the Receivers and the Re-

ceivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. . . .

"I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right."

The hearing of such application was then adjourned until two o'clock in the afternoon of said day for the purpose of hearing counsel for said Receivers who was then heard by said judge in opposition to the granting of such application.

At the same hearing the judge said further:

"Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any particular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. . . .

"The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. . . . Now, they are before the Court; this Court is obligated to protect their rights equally with that

of any body of bondholders who may desire a different course to be pursued."

The affidavit declares that in making this statement the judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in the plan of reorganization hereinabove referred to and was not caring for all bondholders as it is in duty bound to do and as it is doing.

At the conclusion of said hearing upon said 6th day of March, 1916, said judge continued the same for one week to the end that counsel for the Receivers might present affidavits in connection with such application; and at the same time said judge, although requested so to do, refused either to direct the entry of said decree or to deny the application for the entry thereof, although the suggestion that an order denying the application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals in a proceeding for mandamus.

In this connection the affidavit states that said judge manifestly intended to prevent such review and the expression of such Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

6. In the argument upon the return of the order directing the Trust Company to show cause why it should not be enjoined from proceeding with the suit

instituted by it in New York, counsel for the Receivers argued that the Denver & Rio Grande Railroad Company should be made a party to said suit then pending before said judge in his court; that its obligations could be determined in said suit; and that an equitable lien upon its property could be enforced therein; and that, if necessary, the First Mortgage of the Western Pacific Company could be foreclosed as a mortgage upon all the property of the Denver Company.

In his order enjoining the Trust Company from proceeding against the Denver Company with its suit in New York, the judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company, which was collaterally interested in Contract B., should be made parties to said suit then pending in his court and should be compelled to interplead therein.

7. At the time of the making of the decision by the judge requiring the Denver Company and the Missouri Pacific Company to be made parties to the cause, one of the counsel for the Reorganization Committee suggested to him that the effect of the order might be to jeopardize the success of the Plan for Reorganization and requested that the entry of an order pursuant to such decision might be delayed until a hearing could be had and a showing could be made to him of the interest of the bondholders as a whole to have such Plan carried out and of the effect of the order upon

the success of the Plan. The judge, however, peremptorily refused to delay the entry of the order and directed that it should be entered forthwith and that counsel for the receivers should cause it to be enforced.

8. Prior to the 16th day of March, 1916, the Trust Company filed in this Circuit Court of Appeals its application for a writ of prohibition to be directed to said judge and prohibiting him from enforcing his order directing the Missouri Pacific Company and the Denver Company to be made parties to said cause; it perfected its appeal to this Circuit Court of Appeals from the order restraining it from proceeding against the Denver Company without consent of said judge; and it filed in this Circuit Court of Appeals its application for a writ of mandamus to be directed to said judge and directing him to cause to be entered in said suit a decree of foreclosure and sale as stipulated by all parties in interest in the suit and applied for by the Trust Company.

All these proceedings were heard together by this Circuit Court of Appeals on the 16th and 17th days of March, 1916.

9. Prior to the 16th day of March, 1916, the Savings Union Bank and Trust Company, a corporation of which the president is John S. Drum, Esq., the younger brother of Frank G. Drum, one of the receivers appointed by said judge and one of the especially trusted representatives and confidential advisers

of said judge, made application in the cause then pending before said judge for leave to intervene in said cause as the holder of certain First Mortgage bonds of said Western Pacific Company and as a non-participator in the Plan and Agreement for Reorganization hereinafter mentioned. In its petition for leave so to intervene and in its complaint in intervention submitted therewith, said Savings Union Company alleged in substance that the Reorganization Committee of holders of such First Mortgage bonds is controlled by certain firms of bankers in the City of New York; that the Trust Company is controlled by such Reorganization Committee; that said firms of bankers had caused the Denver Company to default in the performance of its obligations to said bondholders; had caused said foreclosure suit to be instituted; had caused said New York suit to be commenced; and had taken all said proceedings for the purpose of enabling the Denver Company to escape the performance of its said obligations; that said firms of bankers were interested directly or indirectly in certain bonds of said Denver Company and entertained the purpose of protecting such bonds as against the interests of holders of bonds of said Western Pacific Company represented by such Reorganization Committee and by such Trust Company; that such Reorganization Committee and the Trust Company are betraying the interests of their respective beneficiaries.

10. Upon the hearing in said applications for writs of prohibition and mandamus on the 16th day of March before this United States Circuit Court of Appeals, counsel for said Savings Union Company were permitted to participate in the argument in opposition to the granting of such applications; and counsel for said judge co-operated with said counsel for the Savings Union Company, and argued that said judge should not be compelled to enter a decree of foreclosure and sale in said cause because of the fact that such application of the Savings Union Company for leave to intervene and file its complaint in intervention had been made; and implied clearly in such argument that said application ought to be and would be granted by said judge, and so granted because the Trust Company had shown unfairness in the administration of its trust and did not and could not properly represent the minority bondholders in the prosecution of said cause.

11. Upon such hearing of said applications and the hearing upon such appeal, said judge authorized John S. Partridge, Esq., and Garret W. McEnerney, Esq., to represent him in opposition thereto, although neither of said applications was opposed by any of the parties to said cause. Upon such hearing, said counsel moved to dismiss said appeal upon the ground that the receivers had not been made parties thereto and upon the further ground that the court had not jurisdiction to review such injunctional order because, as contended

by said judge, such order constituted discipline for contempt and was not an injunction in the proper sense of that term; and demurred to said application for a writ of prohibition and to said application for a writ of mandamus upon the ground that this Circuit Court of Appeals had not jurisdiction to entertain the same.

In general, the facts and the reasons for the belief that bias or prejudice exists, as disclosed by the affidavit, are such as, without explanation, might reasonably induce a belief, and manifestly have induced a belief, that the judge is opposed to the Plan of Reorganization; that he distrusts The Equitable Trust Company of New York; that he believes that the Trust Company is not performing its duty as trustee for the equal benefit of all bondholders; that he is unwilling to permit the Trust Company to exercise its own discretion in matters involved in the carrying out of its trust; that he desires to interpose and exercise his own discretion in such matters in place of the discretion of the Trust Company; that in determining what that discretion shall be he relies wholly upon the receivers and counsel for the receivers, who have shown sympathy with those who charge fraud against the Trust Company; that, although it is essential to the affording to the Trust Company, as trustee, of the relief to which it is entitled in the cause, that such relief shall be afforded with all proper speed, all practises and contentions of the receivers and their counsel and all orders and directions of the court have been such as

have involved and must necessarily involve delay; that the judge conceives that it is his duty to protect bondholders who are not before the court, which conception is evidently based upon his belief that the Trust Company is not itself protecting all bondholders equally.

IV.

AS TO WHETHER THE AFFIDAVIT SHOWS GOOD CAUSE FOR NOT FILING IT WITHIN THE TIME LIMITED BY SECTION 21 OF THE JUDICIAL CODE.

Some of the facts and reasons stated in the affidavit and asserted as justification for the belief that the judge has a personal bias and prejudice, which, in such affidavit, he is stated to have, took place before the 6th day of March, 1916, upon which day the present term of the District Court of the United States for the Northern District of California opened. Many of the principal facts, however, came into existence after the opening of that term. Facts which occurred before the opening of the term are set forth in the affidavit because they give color to, and, in turn, derive color from, facts which occurred after the opening of the term. Indeed, it was not until the declaration by the judge on the 6th day of March, 1916, that he depended upon the receivers and their counsel for information and guidance with reference to the rights of those whose interests have been committed to the

keeping of the court and that the bondholders who had not subscribed to the reorganization scheme were before the court and that the court was bound to protect their rights equally with those of any body of bondholders who may desire a different course to be pursued, followed by the plainest and most strenuous endeavors on the part of the judge, through his counsel, to evade jurisdiction of the Circuit Court of Appeals upon the review of proceedings of the judge, which, if not reviewed and reversed, would necessarily destroy the Plan of Reorganization adopted by a large majority of the bondholders, that the full significance of facts occurring before the opening of the present term of court was demonstrated.

Unless it shall be the policy of the law to require that affidavits of the character of that in question must be filed forthwith after the first intimation of any character that bias or prejudice exists, in order that they may be held to have been filed in time, this affidavit cannot reasonably be held to have been made any later than the earliest time at which the affiant was justified in making it.

The affidavit discloses that it was not until after the complaint in intervention of the Savings Union Bank and Trust Company, containing charges of fraud and bad faith, had been filed and that such charges had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of March, 1916, and had been acquiesced in and ap-

parently approved by counsel for the judge, who were collaborating with counsel for the Savings Union Company, as justifying the action taken by the judge before any charges had been made, that any director, officer or agent of or counsel for the Trust Company became fully convinced that the judge had a personal bias and prejudice against the Trust Company which would cause him to persist in denying to it the relief to which it is entitled in the cause. The affidavit shows that forthwith upon receiving information that the Savings Union Company had applied for leave to intervene in the cause, and information of the character of its complaint, and that the apparent purpose of the intervention and of said judge was to postpone indefinitely the entry in the cause of a decree of foreclosure and sale, the vice-president of the Trust Company, who made the affidavit, came directly to San Francisco from New York, arriving on the 18th day of March, 1916, and proceeded to make investigation and to examine the various papers and records in the cause in order that he might become familiar with the facts in the matter. It states that the vice-president of the Trust Company reached a conviction that personal bias and prejudice against the Trust Company existed in the mind of the judge; and that he returned to New York, reported the facts to the Executive Committee of the Trust Company, and was requested and directed to make the affidavit and cause it to be filed in the cause.

It is submitted that the action of the Trustee and its officers has been dignified, deliberate and conscientious; that any greater haste in the matter would have been improper; that the affidavit was filed at the earliest date upon which reasonably and practically it could have been filed.

It is true that, under the facts, as stated in the affidavit itself, it might well be claimed that the affidavit could have been filed a few days earlier, but it is stated that, in view of the proceedings pending before the Circuit Court of Appeals seeking summary remedies against the judge, it was not considered proper from the viewpoint of ethics to file an affidavit of this character until a decision should have been made in those proceedings.

V.

AS TO WHETHER MANDAMUS WILL LIE.

The writ of mandamus may be used by appellate courts to compel such proceedings as may be necessary in order that the appellate court may exercise the jurisdiction to review given to it by law. *Kendall vs. U. S.*, 12 Peters, at page 622.

In *Barber Asphalt Paving Co. vs. Morris*, 132 Fed., 945, it is said:

"It is obvious that the primary reason for the grant to the federal appellate courts of the dominant power to issue their writs of mandamus to the inferior courts in the exercise of and in aid of their appellate jurisdiction was to enable them

to protect that jurisdiction against possible evasions of it. . . . The moment such a suit" (a suit which is reviewable in the appellate court) "is commenced, the appellate jurisdiction over it exists, the power and the right to ultimately review the proceedings in it are vested in one of the appellate courts. But in the great majority of cases it is only by an appeal or by a writ of error which challenges the final decision in the case that any of the proceedings in it may be reviewed. The opportunities for subordinate courts to evade the jurisdiction of the appellate courts, to prevent the exercise of this jurisdiction, and to destroy or make ineffectual the right of the unsuccessful party to review their rulings by failures to settle bills of exceptions, by unreasonable delays, by stays of proceedings, and by direct and indirect refusals to proceed to final judgments and to their enforcement are far more numerous before the writs of error or the appeals can be taken than they can be thereafter. Few, indeed, are the cases in which appellate jurisdiction is disregarded after the right to it has been actually exercised. But many cases arise in which the acts or orders of the inferior courts, unless corrected by the writ of mandamus, prevent the exercise of appellate jurisdiction and destroy its effect before any final decision which may be challenged by appeal or writ of error has been reached."

And this Court in *In re Dennett*, 215 Fed., 673, considered fully the ground of jurisdiction of the court in mandamus proceedings, and rendered an opinion which is in entire harmony with our contention.

The jurisdiction in this case is clear. The writ is not sought to serve in lieu of a writ of error or

appeal. There is here no question of a matter fully within the power of the judge to decide and which he has wrongly decided. The petition does not present a decision of the judge to the effect that he has jurisdiction, made in a case in which he has power to make such a decision, one way or the other. It presents merely a refusal of the judge to perform a duty imposed upon him by law—a duty purely ministerial. It does not seek to control, or change the manner of the use of, the discretion of the judge. It merely seeks to compel him to perform an act as to the performance or non-performance of which, or as to the manner of performance of which, he has no discretion.

The Trust Company has an absolute right to proceed with its suit. It cannot proceed with it without a judge; and the suit is without a judge.

This Court has a right of review of the suit. It cannot exercise it until there is something to review. There cannot be anything to review unless the suit proceeds; and it cannot proceed until a judge has been designated to proceed with it.

It is idle to suggest that Judge Van Fleet is ready to try the suit and that therefore progress in it need not be stayed. The statute has deprived him of power to proceed; and it is at least questionable whether such power can be conferred upon him by consent of all parties.

If the suit should proceed to decree before Judge

Van Fleet, it is quite true that a review might be had and a determination that the decree was void might be obtained. But that would not be effective relief for the Trust Company. Ultimate relief obtained at the expense of the continuance of an expensive receivership for years is not the relief to which it is entitled.

It was said in *In re Dennett* by this Court that, although it is true that mandamus will not lie where there exists an adequate legal remedy, the legal remedy must be as specific, prompt, and competent to afford relief upon the very subject in controversy as mandamus.

And in *In re Winn*, 213 U. S., at page 466, the Court said:

“Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The writ of mandamus was introduced to supplement the existing jurisdiction of the courts and to afford relief in extraordinary cases where the law presents no adequate remedy. *High on Extraordinary Legal Remedies*, 3d ed., §15. But where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it, an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy.”

The same reasoning is apposite where a judge seeks to wrest, from such judge as may lawfully be desig-

nated to try the suit, the control of a suit pending in his court.

We submit that the writ should be issued as prayed.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,

Attorneys for Petitioner.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE PETITION OF
THE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE, FOR A WRIT
OF MANDAMUS, TO BE ISSUED AND
DIRECTED TO THE HONORABLE WIL-
LIAM C. VAN FLEET, JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALI-
FORNIA, SECOND DIVISION.

BRIEF IN REPLY.

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and
JOHN F. BOWIE,
Amici Curiae.

Filed this.....day of May, 1916.

....., Clerk.

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE
EQUITABLE TRUST COMPANY OF NEW
YORK, AS TRUSTEE, FOR A WRIT OF MAN-
DAMUS, TO BE ISSUED AND DIRECTED TO
THE HONORABLE WILLIAM C. VAN FLEET,
JUDGE OF THE UNITED STATES DISTRICT
COURT, FOR THE NORTHERN DISTRICT
OF CALIFORNIA, SECOND DIVISION.

BRIEF IN REPLY.

The cases principally relied upon to support the argument that Section 21 of the Judicial Code should be construed to place in the district judge the power of determining whether the affidavit of prejudice is sufficient do not deal with statutes like the one in question. For example, the statute under consideration by the Supreme Court of Kansas in the case (*State v. Bohan*, 19 Kan., 54) cited in the opinion of Judge Jones in *Ex Parte Fairbank Company*, 194 Fed., 978, at page 27 of respondent's printed brief, dealt with a statute which provided that it should be made to appear *to the satisfaction of the Court* by affidavit that the prejudice existed.

The California decisions so heavily relied upon

dealt with Section 170 of the Code of Civil Procedure which provides that "When it appears from " the *affidavit* or *affidavits* on file that either party cannot have a fair and impartial trial before any judge " of a court of record about to try the case by reason " of the prejudice or bias of such judge, said judge " shall forthwith secure the services of some other " judge of the same or another county to preside at " the trial of said action or proceeding . . . provided counter affidavits may be filed"

In *People v. Compton*, 123 Cal., at page 413, the court says:

"As to justices of the peace a somewhat similar provision has long been upon our books. . . . The place of trial, where the action is commenced in a justice's court, must be changed when either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice. Under this law it has always been held that the filing of an affidavit in conformity with its provisions makes it the duty of the judge to transfer the cause (*People ex rel. Flagley v. Hubbard*, 22 Cal., 34). It seems to have been contemplated by the legislature in framing the statute applicable to the justice's court that the justice shall be relieved from the very delicate and trying duty of deciding upon the question of his own disqualification, and that the mere fact that a suitor in his court makes affidavit of his belief that the justice is biased against him renders it imperative upon the justice to transfer the cause to some other disinterested officer. We should unhesitatingly say that this same salutary rule was in the mind of the legislature when it amended Section 170 of the Code of Civil Procedure by providing that the litigant shall have a new judge or a transfer of his

cause 'when it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial, by reason of the bias or prejudice of the judge.' But the succeeding portion of the amendment seems to militate against this view, for it is therein provided that counter-affidavits may be filed."

The argument of respondents also appears to fail to get the true meaning of the American Steel Barrel Company case. In that case the court says: "If Judge Chatfield had ruled that the affidavit had not been filed in time or that it did not *otherwise* conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal." And for this decision the court cited *Henry v. Speer*, 201 Fed., 869, *Ex Parte M. K. Fairbank Company*, 194 Fed., 978, and *Ex Parte Glasgow*, 195 Fed., 780.

It should be observed that the court did not include in its statement the situation that is presented in this case. It did not say that if Judge Chatfield had exercised jurisdiction to determine whether, although the affidavit was not filed in time, good cause had been shown why it had not been filed in time, such action could have been excepted to and assigned as error. There can be no doubt that if the affidavit had not been sufficient upon its face, that is to say, if it had not alleged personal bias or prejudice and if it had not been filed in time and no attempt had been made

to show good cause why it had not, the affidavit would not have been entitled to be filed at all and there would have been nothing for the practice provided by the statute to work upon.

The cases cited by the court are consistent with this view. In *Henry v. Speer*, the affidavit in question did not allege *personal* bias, and therefore was not sufficient under the statute. The Court of Appeals held that the judge had the duty to determine whether the affidavit was the affidavit specified in the statute and whether it was legally sufficient, and there can be no doubt that this decision in the premises was sound.

The affidavit in question in *Ex Parte Fairbank Company* did not state or attempt to state the facts and reasons for the belief that the prejudice existed, and therefore was not sufficient under the statute.

The affidavit in question in *Ex Parte Glasgow* was filed after the case had been heard and a verdict rendered, and it is apparent that this was not in time under the statute which provides that the affidavit must be "that the judge before whom the *action or proceeding is to be tried or heard* has a personal bias or prejudice" and so forth.

With regard to the position which respondents take in their brief that mandamus will not lie and to the decisions which they cite in support of that position, it should be observed that they were all cases in which mandamus or habeas corpus, as the case might be, were attempted to be used in lieu of a writ of error or

appeal. In the Steel Barrel Company case, for example, mandamus was sought against Circuit Judge Lacombe, District Judge Chatfield and District Judge Mayer. The court held that mandamus would not lie against Circuit Judge Lacombe to review the determination made by him with complete jurisdiction to make it. It is obvious that it could not lie against Judge Mayer, who was acting under the designation made by Judge Lacombe through an order unreversed and in full force; and it is apparent that for the same reason it could not lie against Judge Chatfield.

The distinction between the American Steel Barrel Company case and this case is that mandamus is not sought here to reverse or displace an order made with full jurisdiction to make it. It is sought merely to compel an action purely ministerial.

If the Court should arrive at the conclusion that the statute is to be interpreted as giving to the Judge, whose qualification is in question, power to determine whether or not the excuse offered for failure to file the affidavit ten days prior to the commencement of the term be sufficient, nevertheless, the petitioner is entitled to the relief prayed for.

The respondent contends that even though the determination that the affidavit was not filed in time be clearly and palpably erroneous, nevertheless the petitioner is not entitled to the writ, for it is asserted that mandamus will not issue to compel the perform-

ance of the ministerial duty of certifying the affidavit.

This claim is wholly predicated upon the theory that the performance of a ministerial duty cannot be enforced by mandamus, if the person against whom the mandamus is sought be a judicial officer, and his refusal to perform the ministerial duty shall have been preceded by a palpable abuse of discretion concerning the matter in relation to which discretion is by law vested in him. Such, however, is not the law.

In *Virginia v. Rives*, 100 U. S., 313 to 323, it is declared that *mandamus does not lie to control judicial discretion, except when that discretion has been abused*.

In *Ex parte Harding*, 219 U. S., 363, after reviewing various cases on this subject, the Supreme Court of the United States, referring to the apparent conflict between cases such as *Virginia v. Rives*, *Virginia v. Paul*, and *Kentucky v. Powers*, on the one hand, and *Ex parte Hoard* and *Ex parte Gruetter*, on the other hand, said:

“Bearing these matters in mind it plainly results that the conflict presented has arisen, not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction, or of any wrongful decision of any of the cases on the merits, but has simply been occasioned, beginning with *Ex parte Wisner*, from applying the exceptional rule announced in *Virginia v. Rives* to cases not governed by such exceptional rule but which fell under the general principle laid down in *Ex parte Hoard* and the line of cases which have followed it.”

It has been repeatedly decided by the Supreme

Court of the United States that a gross abuse of judicial discretion can be corrected on mandamus, even though an appeal be possible, if the remedy by appeal be totally inadequate, or the exceptional circumstances of the case justify interposition in this manner.

See

Virginia v. Rives, 100 U. S., 313;

Virginia v. Paul, 148 U. S., 107;

Kentucky v. Powers, 201 U. S., 1.

This is the recognized rule.

"An exception to the general rule that discretionary acts will not be reviewed or controlled exists when the discretion has been abused, for example, mandamus may in a case be granted where the action has been arbitrary or capricious or from personal or selfish motives."

Cyc., Vol. 26, 161, 162, and cases cited.

"Likewise, it has been held that mandamus may issue where discretion has been exercised on questions not properly within it, *or where the action is based upon reasons outside the discretion imposed.*"

Cyc., Vol. 26, 162.

Where a case is one in which mandamus may properly issue, the fact that a remedy by appeal exists is not determinative of the right to mandamus, but vests in the court to which the application for mandate is made discretionary power either to grant or deny the writ. If the remedy by appeal be adequate

the writ will be denied. If the remedy by appeal be inadequate, the writ will be granted.

In *In re Dennett*, 215 Fed., 673, this Court has held that where the remedy by appeal was not equal to or comparable to that afforded by the writ of mandamus, the mere fact that an appeal was possible did not afford ground for denying the issuance of the writ.

In *Ex parte Metropolitan Water Co.*, 220 U. S., 539, the United States Supreme Court reviewed in a proceeding for mandamus the failure of a District Judge to call in judges to sit with him in a case in which the refusal was based on a misinterpretation of the statute.

In *Barber Asphalt Paving Company v. Morris*, 132 Fed., 954, and in *McClellan v. Carland*, 217 U. S., 268, a writ of mandamus was issued to compel a court to set a case for trial, even though that court had, in the exercise of its discretion, ruled that the case should not, under the existing conditions, be set for trial.

In these cases there was no doubt as to the discretion or power of the trial court to fix the time for the trial of the cause, but the discretion had in each instance been abused, and this abuse of discretion was corrected by mandamus.

We respectfully submit that the performance of a ministerial duty can be compelled by mandamus, even though the refusal to perform that duty be based upon an exercise of discretion. In such cases, how-

ever, the writ can only issue when there has been a plain abuse of discretion. Or, when in exercising the discretion confided, the officer or tribunal has acted upon reasons outside of the discretion imposed.

Of course, in this case there can be no claim that an adequate, or indeed any remedy is possible by appeal from the final decree.

The refusal of Judge Van Fleet to transmit to the Senior Circuit Judge the affidavit filed in this cause was not only a clear abuse of discretion, but was admittedly based on reasons outside of the discretion imposed.

The term of court commenced on the 6th day of March, 1916. At this time no controversy had arisen in the cause, except such as existed between the receivers and their counsel and the Equitable Trust Company, and the controversy then existing in this Court between the Judge of the trial court and the Equitable Trust Company. On this day, and with the cause in this condition, the Equitable Trust Company, acting under advice of its counsel, applied to the Court for a consent decree, the stipulation for the entry of the decree being signed by all parties to the cause. This stipulation was presented to the Court on the morning of March 6, 1916, and the Equitable Trust Company had been advised by counsel that the Court would and could be compelled to grant, and could not refuse to grant, the relief prayed for. The

Court, however, declined to act one way or the other upon the motion; adjourned the hearing thereon until two o'clock of the afternoon of that day, and at this time the Savings Union Bank & Trust Company, of which John S. Drum is president, said John S. Drum being the younger brother of Frank G. Drum, one of the receivers, appeared in the cause and asked leave to intervene, to call witnesses, and become a party, in order that an up-set price of upwards of \$40,000,000 might be placed upon the property.

The lower Court never acted upon either the motion to intervene, or on the petition to enter a decree, all subsequent proceedings having been taken in this Court, except those connected with the filing of the affidavit. These proceedings, as they are doubtless within the recollection of this Court, will not be recapitulated.

However, on the 8th day of March, 1916, counsel for the Equitable Trust Company, desiring to have presented to this Court an appeal from an order made by the Judge of the lower Court on his own motion, and not desiring to have any question concerning the necessary parties to this appeal arise, applied to the receivers and requested them to stipulate to the record, and to waive citation. Counsel for the receivers at this time wrote a letter implying that the receivers would stipulate. This letter is set forth in Judge Van Fleet's affidavit. Within less than twelve hours thereafter counsel for the receivers in-

formed counsel for the Equitable Trust Company that he would not stipulate to the hearing of the appeal.

The questions presented by the appeal were different in form, though similar in substance, to the questions presented on the petition for prohibition, that is, the same questions of law underlaid both cases, but many technical objections might have been urged to the proceeding on prohibition which could not possibly have been urged to the proceeding on appeal. If the right to move to dismiss the appeal had not been asserted, there could have been no objection to the Court of Appeals considering on the merits all questions presented. However, counsel for the receivers refused to sign this stipulation, and their refusal so to do was approved by the Judge of the lower Court.

The only conceivable object for this conduct is that of an intent to prevent, if possible, consideration on the merits of the questions of law which had arisen in the lower Court. The situation in the case being one in which time was particularly vital.

On the 13th or 14th of March, 1916, two days before the appeal came on to be heard in this Court, the Judge of the lower Court made an order, directing the receivers to cause their counsel, to appear in this Court on the appeal and protect the jurisdiction of the lower Court. Pursuant to this order, and unquestionably as intended and instructed by the Judge of the lower Court, counsel for the receivers appeared

in this Court, and objected to a consideration of the appeal on its merits, the objection being based on the fact that no citation had been served upon the receivers, and that service of citation had not been waived by them. These objections were not made until the 16th of March, 1916.

The situation in which the controversy found itself was substantially as follows: The Judge of the lower Court had conceived the theory that there was vested in him power to control the Trustee in the exercise of the powers and functions vested in the Trustee; that by virtue of the initiation of the proceeding to foreclose, the powers of the Trustee had devolved upon the Court, and the Judge of the Court believed that he could exercise these powers as he saw fit without regard to the wishes of the bondholders, or of the Trustee. This right he asserted in certain orders made on the 21st of February, 1916. The Trustee contested this right, and in the contest that thus arose between the Judge and the Trustee, the Judge was in fact and in law an adverse party, and the Judge proceeded to use his power over his receivers, to obstruct a speedy determination of the questions of law, a matter of vital interest to the bondholders.

The fact that the Judge intended so to act did not become apparent, at least no tangible evidence of that fact existed, until on and after the 16th of March, 1916. This was ten days after the commencement of

the term—not ten days before the commencement of the term.

Indeed, the situation was not made absolutely clear until the hearing took place before this Court, viz: On the 16th day of March, 1916.

Mr. Rhoades did not arrive in San Francisco, and no officer of the Equitable Trust Company was in San Francisco, until the day after the conclusion of the hearing before this Court. He made his investigation, and the affidavit sets forth the facts which he then discovered. He returned to New York promptly; laid these facts before the Executive Committee of the Equitable Trust Company at a meeting of that Committee, held on the 29th of March, 1916; immediately transmitted his affidavit to the San Francisco counsel for the Equitable Trust Company, and the affidavit did not reach San Francisco until Sunday, April 2, 1916, and was filed Monday morning, April 3, 1916.

It is true the affidavit sets forth other matters than those herein recited, as a basis for the belief in the existence of prejudice, but the matters which had theretofore transpired, and which are recited in the earlier portions of the affidavit, were not of themselves matters from which any sure deduction of bias or prejudice necessarily flowed. The absence of any contest in the proceeding, coupled with the more or less equivocal nature of the matters then known, made it proper to refrain from the filing of any affidavit

under Section 21, until after the 16th of March, 1916, at which time the sum total of all the facts led the petitioner to believe that its duty required it to file such an affidavit. The affidavit therefore could not, in the nature of things, have been filed prior to the commencement of the term. Surely the delay which took place between the 20th of March, 1916, and the 3rd of April, 1916, was not, under the facts disclosed, sufficient to constitute laches, nor would such laches constitute cause entitling the lower Court to refuse to receive the affidavit.

From the 20th of March, 1916, until the 29th of March, 1916, the merits of the controversy between the Judge of the lower Court and the Trustee were under the consideration of this Court. The Judge of the lower Court had declared that he would not proceed with the cause in the lower Court until this controversy was determined, and it was obviously proper not to file an affidavit of this character pending the hearing of this controversy on appeal. Also, it was obviously proper for Mr. Rhoades to consult the Executive Committee of the Trust Company, and lay the matter before them, and indeed, the duty to take this course devolved upon him when the Judge of the lower Court declared that he would delay proceedings in the cause until after the decision of this Court had been handed down. In view of the fact that the Judge of the lower Court had declared that he would take no proceedings in the cause until this

Court had acted, and in view of the pendency of the proceedings before this Court, we do not believe that counsel for the Equitable Trust Company should have permitted the affidavit to be filed until after the decision of this Court.

We respectfully submit, therefore, that the affidavit showed good cause why the same was not filed prior to the commencement of the term, and that the decision of the lower Court to the contrary is a palpable abuse of discretion. However, the lower Court seems to have based its decision of that question, upon its conclusion upon other matters, concerning which it had no right to form a conclusion, and the decision on the matter involved should not have been influenced by the consideration of other matters admittedly considered.

In the opinion of the lower Court the Court first proceeds to declare and find that the facts and reasons stated are totally insufficient as a foundation for the belief that bias and prejudice exists, and continues:

“I will go farther than that and say that if I felt the least sense of my inability to pass upon the rights of every party involved in this controversy and give them the due meed of justice to which they are entitled, I would ignore every consideration of technical sufficiency and would certify this affidavit to the Senior Circuit Judge with the request that some one else have the burden cast upon them of carrying out what is left before this Court of the controversy in question. But I cannot conscientiously say that I have the least question of my ability to do equal and fair and unbiased justice between those parties. Hav-

ing that feeling, it is my duty to refuse to make such a certificate, and therefore I shall refuse it."

And the Court further said:

"But, summing up the whole affidavit in its entirety, I am quite satisfied, as I have said, that it wholly fails to make a case under the statute which would tend to show the existence in the mind of this Court of a state of personal bias or prejudice against any party connected with this case. I do not care whether technically the Equitable Trust Company is really a party to the controversy still remaining here, or not. It is argued that it is not; but it is a formal party, and I am not prepared to say that legally it did not have a right to interpose an affidavit of this kind. I care nothing about those things. I am looking only at the merits of the matter."

Obviously the refusal of the Court to certify the affidavit was not based upon a sound and legitimate exercise of its discretion concerning the question of whether the affidavit had been filed in time, for the opinion substantially declares that the Court would not have decided as it did decide had that question, and that alone, been submitted to it.

See

Harwood v. Quimby et al., 44 Iowa, 385.

The Equitable Trust Company is a party to the cause, and entitled to file the affidavit.

Counsel for the respondent claims that the Equitable Trust Company is not entitled to raise the question of bias and prejudice, for the reason that the

Equitable Trust Company is not an interested party, that is, not interested in the question of what up-set price should be fixed.

The Equitable Trust Company is, of course, a party to the cause, and is interested in the proper and speedy determination of the cause, and is interested in seeing a proper up-set price fixed. It is also interested in whether an intervention shall be allowed. It is also interested in all incidental questions, such as counsel fees, its own fees, fees for the receivers, etc. It is a highly interested party in the cause, and the mere fact that its position as Trustee may require that it stand impartially in controversies arising between the bondholders concerning what up-set price shall be fixed, is a matter of no importance. As Trustee it owes to every bondholder the obligation of pursuing the cause before an impartial tribunal. The proper performance of its duties as Trustee require it to see that the tribunal before which all questions are decided be impartial as between the parties. If the Equitable Trust Company permitted any question to be determined by a tribunal which it believed not to be impartial, even though that question were one arising between the bondholders and itself, it would be guilty of a breach of trust. The statute merely requires that the affidavit be filed by the party, and the fact that the party acts or appears in a

representative capacity does not destroy its right to file the affidavit.

Carroll v. District Court, 141 Pac., 312.

We respectfully submit that the remedy by mandamus is essential to the preservation of the rights granted by Section 21. If the application here presented be denied the broad benefit intended to be conferred by that section will be restricted and confined within very narrow and technical boundaries.

Respectfully submitted.

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CHARLES S. WHEELER,

and

JOHN F. BOWIE,

Amici Curiae.

No. 2781

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE PETITION OF
THE EQUITABLE TRUST COMPANY OF
NEW YORK, AS TRUSTEE, FOR A WRIT
OF MANDAMUS, TO BE ISSUED AND
DIRECTED TO THE HONORABLE WIL-
LIAM C. VAN FLEET, JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALI-
FORNIA, SECOND DIVISION.

BRIEF OF AMICI CURIAE.

BYRNE & CUTCHEON,
24 Broad Street, New York,
CHARLES S. WHEELER and
JOHN F. BOWIE,
14 Montgomery Street, San Francisco,
Amici Curiae.

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THE NORTHERN DISTRICT OF CALI-
FORNIA, SECOND DIVISION.

BRIEF OF AMICI CURIAE.

The facts upon which this proceeding arises are set forth in the brief filed by counsel for the Equitable Trust Company, and, therefore, are not recapitulated. The controversy turns on the interpretation of Section 21 of the Judicial Code, and we desire to place before the Court the full legislative history of that section of the Code, as well as the decisions of the State courts dealing with State statutes enacted in pursuance of the rules of policy of which Section 21 is an expression.

Section 21 of the Code provides:

“Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge

before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The statute was, at the time of its enactment, new to Federal procedure, though legislation had been enacted in various States of the Union similar in purpose. The Judicial Code was adopted in 1911, and became operative in 1912. While the language of Section 21 is clear, it is but proper to interpret the act in the light of the history of the time at which it was passed (*U. S. v. R. R.*, 157 Fed., 618), and, though we are not at liberty to recur to the views of individual Members of Congress expressed in debate, we may look to the proceeding in Congress, for "*the statements of those who had charge of the law*

“made to the legislative body passing it, as to its meaning and purpose are always competent.”

Ex parte Farley, 40 Fed., 69;

Johnson v. Southern Pacific, 196 U. S., 19, 20.

LEGISLATIVE HISTORY OF SECTION 21.

When the Judicial Code was reported to the House of Representatives, Section 20 was the only provision embodied in the Code which dealt with the question of the disqualification of judges.

This section was a revision of Sec. 601 R. S., and the form of the statute as reported by the Committee is the same as that in which it now exists. That section being then and now as follows:

“Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.”

On December 14, 1910, when the House of Representatives, in Committee of the Whole, was considering the provisions of the Code, Mr. Cullop, of Indiana, suggested that the provisions relating to the

disqualification of judges should be amended so that bias or prejudice should constitute a ground of disqualification, and he further stated that the determination of the question of disqualification should not rest in the hands of the judge whose qualification was disputed. At the close of the discussion Mr. Cullop said:

"I am going to ask permission to add an amendment defining the causes and conditions under which a change of venue shall be granted, and so as to bring that question before the House I am going to ask unanimous consent to have time in which to prepare a provision covering that subject and present it to the House. *I can conceive no greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him. I can conceive of no greater imposition upon any court than to require it to sit, hear, and decide a cause in which it is aware the party litigants have not absolute confidence in his ability or qualification to dispose of it fairly.*

THE SPEAKER pro tempore—The gentleman from Indiana asks unanimous consent to pass for the present the pending section, which is section 20. Is there objection?

There was no objection."

Congressional Record, Vol. 46, Part 1, page 306, col. 2.

Pursuant to the consent thus given, Mr. Cullop reported his proposed amendment, viz:—Section 21 of the Code.

The amendment originally reported in the House as Section 20a, proposed by Mr. Cullop, read as follows:

"Sec. 20a. Whenever a party to any action or proceeding, civil or criminal, shall file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall set forth reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the time set for the trial or hearing of the case, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit."

Congressional Record, Vol. 46, Part 3, page 2626, col. 2.

In presenting the amendment to the House, sitting as a Committee of the Whole, Mr. Cullop said:

"The section that is proposed as section 20a provides that, on the litigant filing the proper affidavit stating the fact that the judge is biased or prejudiced in the case, he shall proceed no further and another judge shall be called, under the provisions of the act, as provided in other cases, who shall hear and determine the case. The affidavit shall state the reasons for the belief that the applicant has for the bias or prejudice of the judge."

Congressional Record, Vol. 46, Part 3, page 2626, col. 2.

In the following colloquy between Mr. Cullop and other Members of the House, Mr. Cullop made clear the purpose of the amendment:

"MR. COX of Indiana—I am partly in favor of the gentleman's amendment, but does he believe that his amendment

will accomplish what he is driving at? In other words, if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the Court?

MR. CULLOP—No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

MR. COX of Indiana—But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

MR. CULLOP—No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him. It does not say that he shall state the facts, but the reasons for the belief that he has that the judge is biased or prejudiced in the case.

Now, this amendment is very essential, in my judgment, for the protection of the courts from criticism. As the matter now stands, a litigant in court has no recourse for relief from the trial judge, but he must submit his case, sometimes feeling, as he may, that the judge is biased and prejudiced and not qualified to sit in the case, but he has no relief whatever. That has provoked, and will continue to provoke as long as the law stands as now, criticism on the court; some of it may be just, some of it may be unjust.

This amendment seeks to remove from the court that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice, so that others may be called to hear and determine the case and avoid the criticism that now exists on the part of litigants in courts in many instances."

In discussing the time at which the affidavit should be filed, it was said:

“MR. BENNET of New York—If in ten days before the date when the case is to be called for trial he files his affidavit, the judge has to go off the bench. If he does not file it prior to that ten days and files it two days before the trial, who is to say whether it is good cause shown or not? The very judge whom he wants to get off the bench because he thinks he is prejudiced?

MR. CULLOP—He must state in his affidavit that the reason for the change was unknown to him before the time that he files it.

MR. BENNET of New York—That is true, but who is to construe the language “for good cause shown”? Suppose the judge says it is not a good cause.

MR. CULLOP—That judge cannot pass upon that question. What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?

MR. BENNET of New York—Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench.

MR. CULLOP—*Then if the judge hesitated upon that, it would be the amplest and best reason in the world why he should be considered as not qualified to sit. Nothing could show the disqualification of a judge more than his action in passing upon some question of that kind in order to hold jurisdiction of a suit. His sense of duty would require him to refuse to pass on it.*

MR. BENNET of New York—The gentleman may be quite correct with relation to the abstract proposition, but I assume that what he is aiming at is to give a man an absolute right to take off the bench a judge whom he does not think qualified to try his particular case.

MR. CULLOP—But when he states that he did not know

the existence of the cause sooner, that settles it. That is done, then. There is no review of that cause. That man alone is the arbiter of that question."

Congressional Record, Vol. 46, Part 3, pages 2628, 2629

Viewing the various clauses of the statute in the light of the purpose of the law as declared to Congress by those proposing its enactment, the correct interpretation of the act is made manifest.

The clause of the section requiring the affidavit to state the reasons for the belief that has existed, was not intended to present any judicial question. Concerning this clause the following explanation was given:

MR. MANN—What is the purpose that the gentleman has in mind in requiring that the affidavit shall state the reason?

MR. CULLOP—The reason for the belief that he entertains?

MR. MANN—What is the reason for putting that in, I mean?

MR. CULLOP—I have done that at the suggestion of the committee. It was not my own purpose to do that.

MR. MANN—That is what I wanted to get at.

MR. CULLOP—*It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.*

MR. MANN—It has been suggested here by members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

MR. BENNET of New York—Not at all.

MR. MANN—When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reasons? Otherwise, what is the object of giving the reason?

MR. CULLOP—No; because the very provision of the statute is that he shall proceed no further. I have no objection to the amendment, but—”

Congressional Record, Vol. 46, Part 3, page 2629.

In reply to some remarks by Mr. Mann, in which that gentleman expressed some fear that the absolute rights given by the amendment might be abused by unscrupulous litigants, Mr. Cullop said:

“None of the numerous objections that the gentleman from Illinois makes are found by experience to exist in the places where this statute has been in use. They are only surmises of the gentleman. There would be no more delay under this statute, or even as much delay, as there is now under the present statute. The present statute is the very reason why parties in suits file applications for continuances and put off the day of trial. Under the present law an unscrupulous litigant can obtain a continuance without any trouble and defer the day of trial. This would be a means to prevent continuances and to expedite the business of the court instead of delaying it, because the man who felt himself dissatisfied with the judge could file his application and be relieved from the jurisdiction of that judge. As it is now, he is driven to file an affidavit for continuance, hoping that perhaps Providence will grant him a change of venue and give him that which the law of his country does not afford, a fair judge before whom to try his case. This will afford him facilities to get another judge, and there will be no trouble, as experience has taught, in procuring another judge to sit in the cause and try the case. I hope the amendment will be adopted.”

Congressional Record, Vol. 46, Part 3, page 2629.

After the discussion above set forth, Section 20a was adopted by the House, the form of the section so adopted being as follows:

"Sec. 20a. Whenever a party or his counsel to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice, either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, and another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed by section twenty-three, to hear such matter. Every affidavit shall state the reason for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit."

Congressional Record, Vol. 46, Part 3, page 2630, col. 1.

In the conference between the representatives of the House and Senate, two amendments were made in Section 20a. The suggested Senate amendments were as follows:

"Section 21. On page 10, in line 13, strike out the words 'or his counsel.' In line 22, before the word 'reason' insert the words *facts and the*. In line 22, after the word 'cause' insert the word *shall*. On page 11, line 2, after the word 'affidavit' insert the words *and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.*"

See Conference Report, 61st Congress, 3rd Sess.,
Doc. No. 848.

The Conference Report submitted by Mr. Moon to

the House, was accompanied by a Statement of the specific changes in matters of substance, made for the purpose of directing attention to all changes of importance. This Statement was read in lieu of the Conference Report (see Cong. Rec., Vol. 46, Part 4, p. 3998), and refers to Section 21 (Section 20a), and mentions as the material change in that section only the provision requiring that the affidavit be accompanied by the certificate of counsel. The change requiring the affidavit to state the facts, as well as the reasons for the belief of the affiant, was not regarded as of sufficient importance to justify a reference thereto (Cong. Rec., Vol. 46, Part 4, p. 4001).

The legislative history of Section 21, and the objects of enacting that statute, as shown by the statements to Congress of those proposing the enactment of the law, demonstrate that the statute was designed to protect litigants from being compelled to submit their cause to a judge whom the litigant believed to be biased. It also appears that there was no intention of permitting the judge whose qualification was challenged to pass upon the question of his own qualification. The very first clauses of the statute declare:

“Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter.”

And, as pointed out by Mr. Cullop:

"MR. COX of Indiana—I am partly in favor of the gentleman's amendment, but does he believe that his amendment will accomplish what he is driving at? In other words, if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the court?

MR. CULLOP—No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

MR. COX of Indiana—But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

MR. CULLOP—No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him."

Congressional Record, Vol. 46, Part 3, page 2626 (bottom), 2627 (top).

Indeed, it seems that the provisions of the statute requiring the reasons why the affiant believes bias to exist were designed to facilitate Congress to remedy abuses arising under the statute, if the same did in fact arise. This is shown by the following dialogue:

"MR. MANN—What is the purpose that the gentleman has in mind in requiring that the affidavit shall state the reason?

MR. CULLOP—The reason for the belief that he entertains?

MR. MANN—What is the reason for putting that in, I mean?

MR. CULLOP—I have done that at the suggestion of the committee. It was not my own purpose to do that.

MR. MANN—That is what I wanted to get at.

MR. CULLOP—It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.

MR. MANN—It has been suggested here by members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

MR. BENNET of New York—Not at all.

MR. MANN—When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reason? Otherwise, what is the object of giving the reason?

MR. CULLOP—*No; because the very provision of the statute is that he shall proceed no further.*"

Congressional Record, Vol. 46, Part 3, page 2629.

The requirement that the affidavit must be filed ten days before the commencement of the term, or good cause for the delay shown, was not intended to present a justiciable controversy to the judge whose bias was in question. This clearly appears from the discussion between Mr. Cullop and Mr. Bennet, wherein it was said:

"MR. BENNET of New York—Who is to construe the language 'for good cause shown'? Suppose the judge says it is not a good cause.

MR. CULLOP—That judge cannot pass upon that question. What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?

MR. BENNET of New York—Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench.

MR. CULLOP—Then, if the judge hesitated upon that, it would be the amplest and best reason in the world why he should be considered as not qualified to sit. Nothing could show the disqualification of a judge more than his action in passing upon some question of that kind in order to hold jurisdiction of a suit. His sense of duty would require him to refuse to pass on it.

MR. BENNET of New York—The gentleman may be quite correct with relation to the abstract proposition, but I assume that what he is aiming at is to give a man an absolute right to take off the bench a judge whom he does not think qualified to try his particular case.

MR. CULLOP—But when he states that he did not know the existence of the cause sooner, that settles it. That is done, then. There is no review of that cause. That man alone is the arbiter of that question."

Congressional Record, Vol. 46, page 2628, page 2629.

Indeed, the conditions prevailing in the country at the time Section 21 of the Code was enacted demonstrated the necessity of increasing, as far as possible, public confidence in the judiciary. At that time various States had proposed constitutional amendments subjecting the judicial branch of the government to recall. Lack of confidence, then widely prevailing among certain classes, threatened the independence of the judiciary, for many people then professed the belief that political liberty could only be assured by destroying the independence of the judiciary. Obviously, it was wise and desirable to enact legislation

calculated to strengthen the faith of the people in the judicial department, and to assure them that the independence of the judiciary might be preserved without danger to the political liberty of the individual. As pointed out by Montesquieu, "Political liberty of the subject is a tranquillity of mind arising from the opinion that each person has of his own safety. In order to have this liberty, it is requisite that the government be so constituted as one man needs not be afraid of another."

D'Alembert Edition, Vol. I, p. 174.

To assure to the litigant a right to trial before a judge of whose integrity and fairness he had no doubt, was the primary object of the act. Indeed, it should be noted that the conference report in which the enactment of this statute was provided for, also limited in other respects the powers of judges sitting in courts of first instance. The act limiting the power of judges in the issuance of interlocutory decrees enjoining the enforcement of legislative acts was part of this same bill.

FEDERAL DECISIONS INTERPRETING SECTION 21.

Section 21 of the Code came before the United States Supreme Court in the case of *Ex parte American Steel Barrel Company*, 230 U. S., 35. The facts of that case were as follows: The Iron Clad Manufacturing Company was adjudicated a bankrupt on December 2, 1911, the creditors' petition having been filed May 23, 1911. Pending the adjudication of

bankruptcy, the creditors filed a petition charging that the assets of the Steel Barrel Company were in fact the property of the Iron Clad Company and praying an extension of the receivership. This application was bitterly contested. All these proceedings were held before Judge Chatfield, who, on March 15, 1912, refused to extend the receivership to the property of the Barrel Company. Counsel for the creditors requested that the entry of this order be stayed so as to permit them to make a new application. Such new application was made March 29, 1912, and at the same time they filed an affidavit under Section 21. To quote from the opinion:

"That affidavit, in substance, alleged that throughout the proceedings in the case, Judge Chatfield had manifested a strong bias and prejudice against the petitioning creditors and against their counsel, and has shown a strong bias toward Mrs. Elizabeth C. Seaman, who was and is the sole person interested in the subject-matter of the bankrupt corporation's property other than the creditors."

When the matter next came before Judge Chatfield, he made the following order:

"A certain affidavit by Thatcher M. Brown having been brought to the attention of the court, which affidavit was filed after the motion was referred to me by Judge Veeder and before any of the parties appeared before me, in which the said Thatcher M. Brown, as a party to the proceeding, makes an affidavit that I have a personal bias either against the creditors or in favor of the opposite party to the proceeding, and asking that another judge be designated in the manner prescribed in section 20, to hear this motion.

I do hereby, in accordance with the provisions of section

21 of the law known as the Judicial Code, and now in effect, proceed no further in this motion, and order that an authenticated copy of this statement be forthwith certified to the Hon. E. Henry Lacombe, Senior Circuit Judge now present in this Circuit, in order that proceedings may be had under section 14 of said act, it being apparent that this motion cannot proceed under section 23, which is prescribed as an alternative method in said section 21 of said law.

The court further certifies that it does not make an entry upon the records of the court (nor does it admit) that it has any personal bias or prejudice, but on the contrary might call in question many of the statements or controvert many of the allegations contained in said papers. And this court feels that if any disqualification exists it was also present when this court directed a verdict of adjudication and made other decisions in favor of said creditors, and when the judge now holding the court upheld the findings of the special commissioner as to charges of contempt against Mrs. Seaman.

The court, however, feels that the intent of section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such judge as may be designated."

Thereafter, the affidavit having come before Judge Lacombe, he appointed Judge Mayer to try the cause.

The Steel Barrel Company thereafter petitioned the Supreme Court for a writ of mandamus, directing Judge Chatfield to proceed to decide the cause, a cause which he had heard, on which he had reached and expressed a conclusion, which was not embodied in a judgment only because the affidavit had been filed. The decision of the Supreme Court is contained in the following extract from the opinion:

"Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the Senior Circuit Judge whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under section 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S., 238; *In re Parsons*, 150 U. S., 150."

The petitioners contended that Section 21 violated the provisions of the Constitution, and the decision of the Supreme Court necessarily negatives that claim. This is the extent to which the decision in this case goes: It holds that the act of the Senior Circuit Judge in designating a new judge, after there has been presented to him an affidavit purporting to comply with Section 21, is a judicial act. If this be true, the Senior Circuit Judge must, of necessity, be vested with jurisdiction to pass on the sufficiency of the affidavit. The opinion, however, contains several dicta. It is said:

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the

pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term."

Much that is here stated is obviously true, but the history of the statute shows that the right of the litigant was not to be restricted by the courts because the facts and reasons set forth in the affidavit did not, in the opinion of a judge, form sufficient basis for the conclusion at which the litigant had arrived. This matter, however, is not here material.

In the opinion it is also said:

"We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that 'personal bias or prejudice' existed. If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry v. Speer*, 201 Fed. Rep., 869; *Ex parte Fairbank Co.*, 194 Fed. Rep., 978; *Ex parte Glasgow*, 195 Fed. Rep., 780, affirmed by this court in *Glasgow v. Moyer*, 225 U. S., 420."

This is undoubtedly true, but the rule announced affords no basis for the claim that the trial judge is called upon to determine the sufficiency of the excuse for delay in filing the affidavit, or to pass upon the sufficiency of the reasons for the belief that the judge

is prejudiced. Any error, whether it be jurisdictional or not, is susceptible of review on appeal.

The history of the act demonstrates, beyond doubt, that the jurisdiction of the judge of the trial court was confined to determining whether or not the affidavit filed purported to be in formal compliance with the provisions of Section 21.

Indeed, in *Henry v. Speer*, 201 Fed., 869, the Circuit Court of Appeals for the Fifth Circuit said:

"Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient, then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

Glasgow v. Moyer, 225 U. S., 420, was a proceeding on *habeas corpus*. In that case the petitioner, after conviction by a jury, and pending the hearing of a motion in arrest of judgment, filed an affidavit. The Court, nevertheless, pronounced sentence. This he sought to review by *habeas corpus*. The Court held the proper remedy was appeal, saying:

"The writ of habeas corpus cannot be made to perform the office of a writ of error." * * *

"The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the descrip-

tion of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decisions can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case, the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant before his trial petitioned this court in habeas corpus, and that his petition was denied on the ground that his proper remedy was by writ of error after trial."

With the exception of the case of *Ex parte Fairbanks*, hereafter considered, the foregoing decisions are the only cases dealing with the interpretation of Section 21.

Many States have similar statutes, and, with few exceptions, the courts have held uniformly that the presentation of the affidavit in form required by statute operated to terminate the judicial power of the judge.

DECISIONS FROM STATES INTERPRETING STATUTES SIMILAR TO SECTION 21.

The Indiana statute, from which the Federal statute was derived, is as follows:

"The court or judge shall change the venue in any civil action upon the application of either party made on affidavit showing . . . bias, prejudice, or interest of the judge."

2 *Rev. Stat.* (1876), 116.

In *Fisk v. Turnpike Co.*, 54 Ind., 479 (1876), the Court said:

"It was the imperative duty of the court to grant the change of venue as prayed by appointing a proper time to hold the trial and calling another judge to try the case. The court had no discretion in the matter. . . . The affidavit was such a one as the affiant had a right to make, and having a right to make it, his motives were not to be impugned. Whatever a person has a right to do in open court according to law he must be allowed to do without having his motives questioned. The affidavit being sufficient, it was the duty of the judge to so adjudge, without taking any further steps in the case."

The following are some of many subsequent cases in Indiana holding that on the filing of such an affidavit the judge must grant the change:

Burkett v. Holman, 104 Ind., 6; 3 N. E., 406;
Woodsmall v. State, 181 Ind., 613; 105 N. E.,
 155 (1914), in which many of the earlier
 cases are reviewed.

In Wisconsin there exists a similar statute, and the rule is the same. *Rines v. Boyd*, 7 Wis., 155.

In Illinois the statute provides that the judge shall award a change of venue on application as therein provided, and requires that the application be verified by the affidavits of two reputable persons.

In *Donovan v. People*, 138 Ill., 602, 28 N. E., 964, the lower court refused to grant the change of venue on the ground of prejudice, notwithstanding the filing of the affidavit, the Court determining that one of the two persons who verified the affidavit was not a rep-

utable person. The Supreme Court reversed this judgment, saying:

"The question is thus presented whether or not an application of the defendant in a criminal case for a change of venue, on account of the prejudice of one or more of the judges of the court in which the case is pending, which conforms to all of the requirements of the statute, can be defeated by counter-affidavits. We think it very clear that this question must be answered in the negative. The petition and the accompanying affidavits comply with the statute and such affidavit purporting to be made by reputable persons, residents of the county, not of kin to the defendant, etc., the right to a change of venue is absolute. The statute nowhere provides for the filing of counter-affidavits in such cases as it does where the ground for the change of venue is the alleged prejudice of the inhabitants of the county. It may be readily seen why such affidavits are allowed in the latter case, but not in the former. In the one case, there being no objection to the impartiality of the judge, he can fairly pass upon the question as to the prejudice of the people on affidavits pro and con; but the question being, is the judge himself prejudiced, there is from the defendant's standpoint no impartial tribunal to weigh the evidence and determine that issue. It is doubtless true that a statutory right to a change of venue is liable to abuse, but that fact confers no power upon courts to limit or qualify the right."

In *Simpson v. Simpson*, 165 Ill. App., 515, the Court said:

"Where the application for change of venue is made on account of the prejudice of the trial judge, the statute gives no discretion, but such judge, if the petition is in proper form and duly verified, must grant the petition and allow the change of venue. After the petition is presented the judge named therein has no power to render any further

order therein, except such as may be made in connection with the one which allows the change of venue."

In Missouri the statute is somewhat similar to Section 21, and limits the right of the party to a single change of judges on the ground of prejudice. In that State it is held that

"Where the application for change is in due form, the judge has no discretion, but must order the cause removed."

State v. Dabbs, 95 S. W., 275.

In Minnesota a similar statute is in force, though there is no limitation on the number of changes which may be obtained. In *State v. Hoist*, 126 N. W., 1090, the Supreme Court of Minnesota said:

"The new law introduces an entirely new feature and its language is plain, direct and positive. It means that the legislature intended that the filing of an affidavit of prejudice with the judge not less than two days before the expiration of the time allowed to prepare for trial, operated of itself, without any other act on the part of either counsel or court, to incapacitate the judge from trying the same."

In North Dakota Section 5454 of the Revised Code, enacted in 1899, provides:

"When either party to a civil action pending in either of the District Courts of the state shall, after issue joined, and before the opening of any term at which the cause is to be tried, file an affidavit corroborated by the affidavit of his attorney in such cause and that of at least one other repu-

table person, stating that there is good reason to believe that such party cannot have a fair and impartial trial of said action by reason of the prejudice, bias or interest of the judge of the District Court in which the action is pending, the court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending."

In *Orcutt v. Conrad*, 87 N. W., 982, decided in 1901, the Court said:

"Whatever the fact may have been when abstractly considered, it is nevertheless true under the plain reading of the statute that the filing of the required affidavits operated to judicially establish the fact of the existence of bias or prejudice, or both, in the mind of the resident judge with respect to this case, and further operated to oust that judge of all authority to act judicially in this action after the affidavits were filed. The legislature has declared in terms that after the prescribed affidavits are filed 'The court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending.'

In this case it appears that the defendant has in all particulars complied with the terms of the statute which are obligatory upon her, and having done so it cannot be doubted that she has thereby entitled herself to the benefits of the enactment. . . . As to the single question involved in this case, we think the provisions of the statute are unambiguous and entirely decisive. The language of the law-maker is explicit. When affidavits of prejudice have been filed the mandate of the statute is 'that the court shall proceed no further in the action.' Disregarding this inhibition of the statute, the resident judge has in this case proceeded,

against objections seasonably interposed, to take cognizance of and herein determine an important question arising in the case."

In Oklahoma Section 538 of the Laws, as amended in 1895, provides:

"If it be shown to the court by the affidavit of the accused that he cannot have a fair and impartial trial by reason of the bias and prejudice of the presiding judge . . . a change of judge shall be ordered, and the clerk of the District Court shall immediately transmit to the Supreme Court of the territory a certified copy of the order."

In *Lincoln v. Territory*, 58 Pac., 730, the Supreme Court of Oklahoma construed this statute as being mandatory, and held that on the filing of the affidavit the judge was *ipso facto* disqualified from proceeding further. The Court, in its opinion, p. 732, said:

"Now in this case, under the section of the statutes in question, the only evidence of the facts stated in said affidavit is the affidavit itself, as no one would contend, it seems to us, that in such a case counter-affidavits could be filed or other evidence heard. Then when the affidavit is presented to the court it stands uncontradicted and the only means by which the court could dispute it would be to use his personal knowledge. This would practically make him a judge in his own case, as the allegation in the affidavit is that he, the presiding judge, is biased and prejudiced against the accused. The charge is made against him personally of bias and prejudice. Now would it be reasonable to say the identical person against whom such a charge was made would be a competent tribunal to try and decide that question? To allow a man to judge of matters in which he is personally interested is not only contrary to the true prin-

principles of all law, but is repugnant to our ideas of justice, and it seems to us to submit such charge for decision to the judge against whom such prejudice was charged would be to defeat the change of judge in every case where such prejudice actually existed, for, in the language of Judge Brewer, 'All experience teaches that usually he who is prejudiced against another is unconscious of it or unwilling to admit it.'"

See also,

Buckman v. State, 101 Pac., 295 (decided in 1909).

In 1909 the Oklahoma law was amended by the passage of the following act:

"Any party to any cause pending in a court of record may, in term time or in vacation, file a written application with the clerk of the court setting forth the grounds upon which the claims are made that the judge is disqualified, and request him to so certify after a reasonable notice to the other side, same to be presented to such judge, and upon his failure so to do within three days before said cause is set for trial, application may be made to the proper tribunal for mandamus requiring him so to do."

Art. 6, Ch. 24, *Snyder's Comp. Laws of Okla.*

In *Kelly v. Ferguson*, 114 Pac., 631, the Court, in construing the statute of 1909, said:

"It is evident that the statute never intended that a judge should hear evidence and judicially pass upon the question of his own prejudice. Such trial would be almost sure to result in an unseemly contest, just as it did in this case. . . . The facts upon which the claim of prejudice is based must be set out in the original application, so that

the judge and the county attorney may know what is claimed and upon what such claim is based. . . . *We want to make it clear that the trial in cases of this kind does not take place in the lower court. It is illegal and absurd to place a judge on trial before himself. His trial would manifestly be a miserable farce. No man is competent to sit in judgment upon his own conduct or when his individual integrity or feelings are involved. The fact that he assumes that he is competent to do this is conclusive evidence of the fact that he is incompetent to properly discharge this judicial duty. . . . We are therefore of the opinion that respondent should not have attempted to hear testimony and judicially determine the question of his own prejudice. The respondent, however, opened court and placed Honorable George W. Ferguson regularly on trial before himself. . . . It is difficult for us to treat this matter seriously. It sounds more like a joke than it does like a judicial proceeding. It is the first instance that has come to our knowledge in which a judge has placed himself on trial before himself, and we truly hope that nothing of this sort will ever occur again in the State of Oklahoma."*

In *Cox v. U. S.*, 100 Fed., 293, the Circuit Court of Appeals construed the Oklahoma statute, saying:

"The application of the defendant for a change of judge conforms to the requirements of this statute and the denial of the application by the trial court and the affirmance of this ruling by the Supreme Court of the territory were error. The statute is plain, unambiguous and mandatory. Our attention has been called to a late opinion of the Supreme Court of the territory of Oklahoma—*Lincoln v. Territory* (58 Pac., 730)—in which that court construes the section of the statute we have quoted and holds, and rightly as we think, that when the accused makes affidavit that he cannot have a fair and impartial trial by reason of the bias and prejudice of the presiding judge, it is the duty of the court to order a change of judge to be effected in the

mode provided by the statute, and that a refusal to do so is error fatal on appeal to any judgment the court may thereafter render against the defendant in the cause."

In *Stephens v. Stephens*, 152 Pac., 164, the Supreme Court of Arizona said:

"So far as we have been able to discover, the courts have uniformly held where an affidavit of bias and prejudice is in the language of the statute, the presiding judge can perform no other function in connection with the case other than to make an order that the trial be had before another judge as provided by the statute. The truth of the affidavit filed is not what disqualifies the judge but the affidavit itself."

In *People v. District Court*, 152 Pac., 149, the Supreme Court of Colorado said:

"A change of judge is conditioned not upon the actual fact of his prejudice, but upon the imputation of it. The facts set forth in the recusation must, for the purposes of the motion, be accepted as true, notwithstanding they may be known to the judge and all mankind to be false. The whole matter is left to the conscience of the petitioner and affiants, and when affidavits fulfilling the requirements of the statute are presented, the change must be made and the truth of the matter is not open to question."

We respectfully submit that Section 21 of the Judicial Code should not be interpreted so that any justiciable question of law or fact is presented to the judge whose qualification is assailed.

The statute declares that if any affidavit be filed by a party, charging personal bias or prejudice on the

part of the trial judge, such judge *shall proceed no further in the cause.*

It is true that the statute declares:

(a) The affidavit shall state the fact and reasons for the belief that bias exists.

(b) The affidavit shall be filed ten days before the commencement of the term, or good cause shown for failure to file it within such time.

(c) The good faith of the affiant must be certified by counsel.

These requirements have been made to guard against the abuse of the right conferred. It was never intended to grant to the judge whose qualification was assailed, and whose actual disqualification was conclusively assumed, the right to determine whether the affiant had acted with due diligence in making the attack. Indeed, the person who proposed the act declared that any judge who would assume to act on a question of this character, would thereby establish the very fact of his disqualification.

Of course, the judge must look at the affidavit to see whether or not it is an affidavit filed under Section 21. He must peruse the paper to ascertain:

1. Whether he is charged with personal bias for or against a party.

2. Whether the affidavit has been certified by counsel to have been made in good faith.

3. Whether the affidavit contains a statement of facts and reasons on which the affiant declares that he bases his belief in the prejudice of the judge.

4. Whether the affidavit purports to show an excuse for the delay in filing the same until a day which is less than ten days prior to the commencement of the term if it be not filed before.

But the judge in question cannot:

1. Controvert the fact of bias.

2. Pass upon the truth or sufficiency of the facts and reasons on which the opinion of the affiant is based.

3. Inquire into the good faith of counsel in certifying to the affidavit.

4. Pass upon the legal sufficiency of the excuse set forth in the affidavit as good cause for failure to file the same ten days prior to the commencement of the term.

It was never intended to permit the judge whose fairness was called in question to pass judicially on any question of law or of fact, for the statute expressly declares *that such judge shall proceed no further in the cause.*

In *Murdica v. State*, 137 Pac., 575, the Court held

that the filing of an affidavit of bias prevented the judge from passing on any issue of law or fact, even though that issue arose in connection with another part of the same affidavit, the Court saying:

"We think the trial, as contemplated in the statute under consideration, begins when any controverted question of law or fact is presented to the court for determination."

The duty to pass judicially on any justiciable question arising after the affidavit is filed, devolves on the Senior Circuit Judge.

As said in the Steel Barrel case:

"Judge Lacombe (the Senior Circuit Judge) was clearly called upon to determine in the exercise of his jurisdiction as the senior circuit judge whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under section 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S., 238; *In re Parsons*, 150 U. S., 150."

Surely the statute does not contemplate that these questions shall be twice decided judicially, first, by the trial judge, and again by the Senior Circuit Judge. Undoubtedly, Judge Chatfield expressed the correct view when he said:

"The Court further certifies that it does not make an entry upon the records of the Court (nor does it admit) that it has any personal bias or prejudice, but on the con-

trary might call in question many of the statements or controvert many of the allegations contained in said papers."

"The Court however feels that the intent of section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such Judge as may be designated."

In addition to the obvious and clear purpose of the framers of the act, there is every reason why the statute should be interpreted so as to withdraw from the judge whose bias is in question the duty to decide judicially any question, when as a result of such decision jurisdiction of the case might be retained, for, as pointed out by Judge Brewer:

"All experience teaches that usually he who is prejudiced against another is unconscious of it, or unwilling to admit it,"

and, as said by the Supreme Court of Oklahoma, in *Kelly v. Ferguson*, 114 Pac., 631:

"No man is competent to sit in judgment upon his own conduct or when his individual integrity or feelings are involved. The fact that he assumes that he is competent to do this is conclusive evidence of the fact that he is incompetent to properly discharge this judicial duty."

The Wyoming Act of 1910 provides:

"Sec. 5147. The defendant in a criminal action may make an affidavit stating that he believes he cannot receive a fair trial owing to the bias or prejudice of the judge

or the excitement or prejudice against him in the county; the prosecuting attorney may thereupon traverse by his affidavit the allegations of defendant, except those concerning the bias or prejudice of the judge, and the court or judge shall thereupon set down the issue so presented for trial before him at a stated time, at which times both parties shall present their witnesses, who shall be examined under oath orally, and if it appears to the court or judge, upon such hearing, that the trial would be more impartial in another county, the application shall be granted."

In *Murdica v. State*, 137 Pac., 575, the defendant filed an affidavit, setting up the existence of bias on the part of the judge, and local prejudice in the county. The judge heard and determined the question of local prejudice, and after deciding that question, called in another judge to hear the cause. The Supreme Court reversed the judgment, saying:

"The purpose of the statute is to give the defendant the right to a fair trial before a judge and jury who are neither biased nor prejudiced. The ruling upon a motion for a change of venue, when contested, involves the weighing of evidence and the exercise of a legal discretion, and under the statute the filing of the affidavit for a change of judge alone disqualifies the judge against whom such affidavit is directed from presiding at the trial by reason of an indisputable presumption of bias or prejudice arising from the making and filing of such affidavit. To permit a judge against whom objection has been properly made to preside at the hearing and determine a disputed motion for a change of venue or a continuance might be far more prejudicial than a ruling on the admission of testimony or the giving of an instruction. It is true that the statute gives the defendant the right to file such an affidavit, but we cannot say that the statute should be held for naught because the right or privilege is subject to abuse, but, if

it be so, then the remedy is with the Legislature and not with the courts. It will be observed that by section 5147, upon filing an affidavit objecting to the judge, no traverse to such affidavit is permitted to be filed. In other words, no issue of fact is or can be permitted. No legal discretion is lodged in the court, for the filing and calling the court's attention to such an objection of record disqualifies the judge so objected to from trying the case. It is suggested that the statute is subject to the construction that the judge is disqualified only from presiding at the trial; that the trial begins after the jury is sworn; and that the disqualification goes to the trial or continuance of the case alone and not to preliminary matters leading up to the trial."

"We think the trial, as contemplated in the statute under consideration, begins when any controverted question of law or fact is presented to the court for determination."

In the case of *Ex parte Fairbanks*, 194 Fed., 978, the judge, whose fairness was called in question, undertook to pass judicially on all matters connected with the affidavit. The opinion of the judge in that cause is, we believe, the strongest argument against the practice adopted. The conclusion reached on the questions of law therein discussed, was obviously influenced by the personal feeling aroused by the charge. The decisions in *Henry v. Speer* and the Steel Barrel case render it unnecessary to discuss the opinion. In fact, that decision justifies the observations of the Oklahoma court. Indeed, the opinion in the case of *Ex parte Fairbanks* emphasizes the impropriety of placing upon a judge the burden of passing judicially on any question involved in an issue arising on the question of the qualification of the judge him-

self. Nothing could be more destructive of public confidence in the courts; nothing could more effectually defeat the primary object of the enactment of Section 21.

We submit that the interpretation of Section 21 here contended for is correct, but if it be otherwise,—if the sufficiency of the facts and reasons set forth in the affidavit are subject to review, and the question of the sufficiency of the excuse for not filing the affidavit ten days prior to the commencement of the term may be inquired into by the judge—still, there is no doubt that in this case mandamus should issue. But as these questions are fully discussed in the brief of counsel for the Trustee, we will say nothing further on this branch of the case.

Respectfully submitted.

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CHARLES S. WHEELER,
and
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14 Montgomery Street, San Francisco,
Amici Curiae.

No. 2781

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Petition of the EQUITABLE
TRUST COMPANY of New York, as Trustee, for
a Writ of *Mandamus*, to be Issued and Directed
to the Honorable WILLIAM C. VAN FLEET,
Judge of the United States District Court, for
the Northern District of California, Second
Division.

SUPPLEMENT TO BRIEF FOR RESPONDENT.

GARRET W. McENERNEY,
JOHN S. PARTRIDGE,
Counsel for Respondent.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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SUPPLEMENT TO BRIEF FOR RESPONDENT.

We have just been served (May 9, 1916) with a "Brief in Reply" signed by counsel for petitioner and counsel for the reorganization committee, the latter appearing as *amici curiae*.

No provision was made for the filing of briefs after submission, and we had supposed that no briefs would be filed.

Inasmuch as we have been served with this brief, we have assumed it is proper for us to serve and file this supplement, that we may deal shortly with matters of dispute between counsel and ourselves.

1. We do not rely upon the decisions in Kansas or California for the construction of Section 21 of the Judicial Code. We claim that its construction has been definitively settled by the Supreme Court in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, and that nothing further need be said upon the point. We wish, however, to emphasize a sentence in that opinion, as follows (230 U. S. 45):

“We shall not pass upon the timeliness of the affidavit, *nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment* that ‘personal bias or prejudice’ existed.”

We understand this sentence to mean that every affidavit presents for determination the question of “the legal sufficiency of the facts therein stated, as affording ground for the averment that ‘personal bias or prejudice’ existed”, and that the Supreme Court did not pass upon that question because it had been passed upon judicially by the judge to whom it was addressed (Judge Chatfield), and the matter was to be reviewed, if at all, on appeal from the decisions of Judge Mayer sitting in the place of Judge Chatfield.

In other words, one of the grounds upon which mandamus was refused in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, was that the matter had been passed upon judicially by Judge Chatfield and that he had decided that the affidavit was sufficient and timely. The Supreme Court decided not only that he had jurisdiction to determine that the affidavit was sufficient and timely, but it went farther and said, in terms (which would necessarily follow if it had not been said), that

as he had jurisdiction to decide that it was sufficient and timely he had also jurisdiction to decide that it was neither sufficient nor timely.

2. If, however, the question were open, we would rely upon the Federal cases cited with approval and followed by the Supreme Court in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35.

In speaking of *Henry v. Speer* (C. C. A., 5th C., 1913), 201 Fed. 869 (Br. Res., pp. 28-29), we said that "the court held that the affidavit was insufficient because it did not state that Judge Speer had 'a *personal* bias or prejudice' ". This same statement is made in petitioner's Brief in Reply (p. 4).

The decision in *Henry v. Speer* went much farther, however, because it held that "the facts and reasons advanced" dealt rather with "a prejudgment of the merits of the controversy", adding: "Section 21 is not intended to afford relief against this situation."

In other words, we understand this case to decide that, if "the facts and reasons advanced" show "a prejudgment of the merits of the controversy" rather than a personal bias or prejudice against the litigant, the affidavit is insufficient, and the judge sought to be disqualified, in determining its "legal sufficiency", can so hold.

Counsel are mistaken in the statement that the affidavit in *Ex parte Fairbank Co.* (1912), 194 Fed. 978, did not contain any statement "of the facts and the reasons for the belief." The affidavit said that the correspondence was the fact and the reason for the

belief, but Judge Jones held that that fact and reason were insufficient to support the averment of a personal bias or prejudice (Br. Res., pp. 25-27).

In *Ex parte Glasgow* (D. Ct., N. D. Ga., 1912), 195 Fed. 780, the court held that if a judge decided that the affidavit was insufficient, and proceeded with the case, his action was not void, thereby implying that the determination was judicial and, as expressly stated, reviewable upon appeal.

3. In addition to the Federal cases referred to, we claim that the decisions in Kentucky and Idaho may be appropriately drawn upon, because in those states, the statute, like Section 21 of the Judicial Code, requires that the disqualifying affidavit give facts and reasons, and it is the law in those states that the sufficiency of the affidavit will be determined by the sufficiency of the facts, and the sufficiency of those facts is for the determination of the judge sought to be disqualified, whose judgment against their sufficiency will, if occasion arise, be reviewed upon appeal.

See *Landram v. German Ins. Co.* (1889), 88 Ky. 433; 11 S. W. 367, and cases from Kentucky and Idaho cited in Br. Res., pp. 37-38.

In addition to the cases from these two states, we rely upon *Hays v. Morgan* (1882), 87 Ind. 231 (Br. Res., pp. 38-39). Although the statute in Indiana does not require the facts to be set out, in the case just mentioned *the facts were set out* and the judge sought to be disqualified decided that the affidavit was to be determined by the sufficiency of the facts stated

(although the affidavit would have been sufficient without a statement of the facts), and in so holding he was affirmed upon appeal.

In this connection, we attach importance to the fact that the words "*facts and*" were introduced into Section 21 of the Judicial Code as the result of the report of a conference committee representing both Houses of Congress, March 2, 1911 (see Appendix), and that of the six members of the committee one came from Kentucky (Representative Sherley) and another from Idaho (Senator Heyburn), and that the type of disqualifying affidavit here involved does not exist in any of the other states represented on the Conference Committee (Pennsylvania, New York, Utah, and Arkansas).

4. In his oral argument Mr. Bowie made the point that the Congressional debates were not mentioned in the brief of respondent, as affording the basis for an argument that they were deemed by us to be unfavorable to the interpretation of the statute upon which we rely.

In preparing for the argument we carefully examined the Congressional debates and believed that they sustained the interpretation put upon Section 21 of the Judicial Code by the Supreme Court in *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, and the cases from the Federal Reporter already dealt with, but we did not refer to the legislative history of the section in view of the decisions which attach little or no weight to Congressional debates (*U. S. v. Trans-Missouri Assn.* (1896), 166 U. S. 290, 318; *Lapina v. Williams* (1914), 232 U. S. 78).

We also drew upon the California cases and cases from other states to show that it is the common and ordinary practice for proceedings to disqualify a judge to be heard and determined by the judge so sought to be disqualified, and that the usual remedy for error in such cases is the ordinary one of appeal.

Inasmuch, however, as the petitioner attaches much weight to the debates themselves, we add as an appendix the analysis of those debates which we made in preparation for the argument of this matter.

5. In petitioner's Brief in Reply (p. 1), counsel speak of the California decisions "so heavily relied upon", as though we drew upon them for the construction of Section 21 of the Judicial Code.

What we drew upon the California cases for was to show that a judge sitting to hear the question of his own disqualification is acting judicially.

We also cited those cases to show that applications to disqualify judges are often denied upon an uncontradicted showing as in *Estate of Dolbeer* (1908), 153 Cal. 652, 656.

6. We pointed out on the oral argument that, in view of the reference in Section 21 of the Judicial Code to Section 23 of the same code, a judge might decide a disqualifying affidavit to be sufficient and timely and call in his colleague in a district where there are more district judges than one, and, therefore, that it is not true that the senior circuit judge is called upon to pass upon the sufficiency and timeliness of the affidavit. To this point the petitioner has made no reply.

7. If Judge Van Fleet had made the order asked by the petitioner (Br. Res., pp. 19, 20) he would thereby have found (a) that the affidavit was sufficient, and (b) that it was in time. It is true that the petitioner did not ask him to make such a finding in terms in the order, but that would have been the necessary legal implication arising from the making of the order.

8. It is hardly arguable that it was the intention of Section 21 of the Judicial Code to require the litigants to attend before the senior circuit judge in whatever part of the circuit he may be, to argue the sufficiency and timeliness, or insufficiency and untimeliness, of a disqualifying affidavit. This is another circumstance to show that it never was intended that he should decide the matter.

9. The petitioner gives a far-fetched interpretation of *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35, when it endeavors either to argue or to suggest that that case is authority for the proposition that the senior circuit judge must pass upon the sufficiency of the affidavit.

All that the case decides is that when the senior circuit judge receives an affidavit of personal bias and prejudice upon which the judge sought to be disqualified has acted, and which either expressly or by necessary legal effect, he has adjudged to be both sufficient and timely, the senior circuit judge is then called upon in the disposition of the judicial business of his circuit to assign another district judge to sit in the proceeding in which the disqualifying affidavit was filed.

The point with which the Supreme Court was dealing, when it used this language, had nothing to do with the question of determining the sufficiency or timeliness of the affidavit.

10. In Petitioner's Brief in Reply (pp. 15-16), the attempt to deal with Judge Van Fleet's order holding that no case for his disqualification had been made out, as though its scope could be limited by his reasons, fails because the order is not predicated upon limited reasons but rests upon the ground that the affidavit was neither sufficient nor timely. The fact that Judge Van Fleet said that he did not care whether or not the petitioner was technically a party to the controversy is nothing to the point. Furthermore, orders do not depend for their effectiveness upon the reasons assigned for their entry.

Latting v. Owasso Mfg. Co. (C. C. A., 8th Cir., 1906), 148 Fed. 369;

Josslyn v. Cadillac Automobile Co. (C. C. A., 6th Cir., 1910), 177 Fed. 863;

McCloskey v. Pacific Coast Co. (C. C. A., 9th Cir., 1908), 160 Fed. 794;

Eureka County Bank v. Clarke (C. C. A., 9th Cir., 1904), 130 Fed. 325;

Dean v. Davis (C. C. A., 4th Cir., 1914), 212 Fed. 88;

Fourth National Bank of Macon v. Willingham (C. C. A., 5th Cir., 1914), 213 Fed. 219;

Von Baumbach v. Sargent Land Co. (C. C. A., 8th Cir., 1914), 219 Fed. 31;

Mason v. United States (C. C. A., 8th Cir., 1915), 219 Fed. 547.

11. It seems to be conceded (Petitioner's Brief in Reply, p. 17) that the trustee, as trustee, has no *real* interest in the question of an upset price. That question is one between the reorganization committee as intending purchaser, on the one hand, and the minority bondholders, on the other.

The reorganization committee is not appearing here as such, and the trustee, as trustee, will not be permitted to maintain a proceeding in mandate the object of which is to achieve the purposes of the majority bondholders in a controversy which they have with the minority bondholders and in respect of which, as matter of law, the trustee would be treated as neutral if it had not become allied with the majority bondholders.

12. In this case the trustee, as trustee, seeks Judge Van Fleet's disqualification in order that he may not fix an upset price. The proceeding is prosecuted at the request of the majority bondholders and the petitioner is here supported by the counsel for the majority bondholders.

The trustee, as trustee, will not be permitted to prosecute an application which is really the application of the majority bondholders, even though the trustee has become an integral part of the reorganization committee and has *de facto* an interest in the case in hostility to and in conflict with the interests of the minority.

In other words, the petitioner, as trustee, is a party to this action because it holds a position fiduciary to all the bondholders. Since the litigation commenced, it has become allied with one group of the persons to whom it bears a fiduciary relation, and that group has

interests in conflict with the interests of the remaining group, in respect of the upset price.

We shall assume for present purposes that the trustee was at liberty openly to ally itself with the group of which it is an integral part. We insist however, that having done so, it will not be permitted to use the standing which it has as a party to the action, *representative of all the bondholders*, to accomplish the purposes of some of the bondholders with whom it has become allied, and who in their ultimate object (a low or no upset price) have interests in conflict with those of the other group of minority and non-depositing bondholders.

13. We think that the question of when mandamus will lie and when it will not lie is foreclosed of debate by *Ex parte American Steel Barrel Co.* (1913), 230 U. S. 35; *Ex parte Roe* (1914), 234 U. S. 70, and *Ex parte Harding* (1911), 219 U. S. 363.

It may be helpful, however, for us to point out (a) the jurisdiction in general of the Supreme Court to issue writs of mandamus, and (b) the jurisdiction of circuit courts of appeal, from which it appears that the ampler power of the Supreme Court is not extended to the circuit courts of appeal.

The jurisdiction of the Supreme Court in mandamus is two-fold:

(a) When necessary for the exercise of its appellate jurisdiction (Sec. 262, Judicial Code, copied from Sec. 716, Rev. Stats., in turn copied from Sec. 14, chap. 20, Judiciary Act 1789); and

(b) "In cases warranted by the principles and usages of law to any courts appointed under the authority of the United States" (Sec. 234 of the Judicial Code, copied from Sec. 688, Rev. Stats., and in turn taken from Sec. 13, chap. 20, Judiciary Act.)

The powers of circuit courts of appeal in mandamus are those only which are mentioned in Section 262 of the Judicial Code, and do not extend to those which are enjoyed by the Supreme Court under Section 234 of the Judicial Code.

Section 12 of the act creating a circuit court of appeals gives this court, in respect of mandamus, "the power specified in Section 716 of the Revised Statutes of the United States" (26 Stats. at L., 829) and does not give it the powers specified in Section 688 of the Revised Statutes and now carried into Section 234 of the Judicial Code.

If they were otherwise applicable (which they are not) the cases of *Ex parte Virginia* (1880), 100 U. S. 313, and *In re Winn* (1908), 213 U. S. 458, would not be in point here, for they were decided under the power given to the Supreme Court in Section 688 of the Revised Statutes—a power which the circuit court of appeals does not possess.

Respectfully submitted,

GARET W. McENERNEY,

JOHN S. PARTRIDGE,

Counsel for Respondent.

San Francisco, May 10, 1916.

APPENDIX.

THE LEGISLATIVE HISTORY OF SECTION 21 OF THE JUDICIAL CODE, AS IT IS FOUND IN THE CONGRESSIONAL RECORD.

The legislative history of Section 21 of the Judicial Code may be found in the proceedings of the House of Representatives for the three days following:

- (a) December 14, 1910, (see Congressional Record, Vol. 46, Part I, pages 1-1038, 61st Congress, 3d Session, Dec. 5, 1910—Jan. 17, 1911).
- (b) February 15, 1911, (see Congressional Record, Vol. 46, Part 3, pages 2037-3034, 61st Congress, 3d Session, Feb. 7—Feb. 20, 1911).
- (c) March 2, 1911, (Congressional Record, Vol. 46, Part 4, pages 3035-4022, 61st Congress, 3d Session, Feb. 21—March 2, 1911).

We shall briefly state what these proceedings were and point out the significance and importance of some of them as we go along.

HOUSE OF REPRESENTATIVES, DECEMBER 14, 1910.

The subject matter of the present Section 21 of the Judicial Code was first brought to the attention of Congress in the House December 14, 1910 (p. 305, column two, near bottom) by Mr. Cullop of Indiana, and a discussion took place which resulted in unanimous consent to his proposing an amendment to Section 20 on the subject of disqualifying a judge (p. 306, column two, middle).

It is very clear from Mr. Cullop's statements that he wished to offer an amendment which would forthwith and automatically remove a judge.

Mr. Sherley of Kentucky said (p. 306, column two, second half):

“Mr. Speaker, the gentleman from Indiana has raised a very important and, to my mind, *a very difficult question*.^{*} One of the first bills that I ever introduced as a Member of Congress was a bill giving to litigants the right to swear off a judge *where proper allegations*,[†] supported by affidavits, were made as to the judge’s unfairness. That bill was the result of a direct experience of my own. That evil exists to-day, and is only equaled by one other evil in the Federal practice. There is not to-day any method whereby a litigant may have the record show the actual proceedings of the trial court, if the Federal trial judge wants to deny him that right. You may mandamus a Federal judge to sign a bill of exceptions, but you can not obtain a writ of mandamus to compel him to sign a particular bill, and there is no way by which you can make the records show any fact that he is not willing to permit to go into the bill of exceptions.”

The House then proceeded to other business, but later in the day (p. 320, column two, near bottom) the following occurred:

“Mr. CULLOP. Mr. Speaker, when we were considering section 20 permission was granted me to offer an amendment to be taken up at some time when the bill was under consideration in the House. I have prepared the amendment, and I ask to have it made a part of the record so that Members can see what it is before being asked to vote upon it.

^{*}It is to be noted that Mr. Sherley is from Kentucky where a disqualifying affidavit must contain the facts relied upon for the disqualification of the judge. (See *German Ins. Co. v. Landram* [1889] 88 Ky. 433; 11 S. W. 367, and cases from Kentucky in Brief on Behalf of Respondents, page 37.)

[†]It is to be observed that Mr. Sherley had in mind an affidavit containing “proper allegations”, which we understand to mean facts tending to show bias and prejudice.

The SPEAKER. The gentleman from Indiana asks unanimous consent that the following amendment, which he offers, may be printed in the Record. Is there objection?

There was no objection.

The amendment is as follows:

That section 20 be amended by adding thereto the following:

‘That a change of venue from any judge shall be granted to either party to any action when the party asking said change shall make and file an affidavit stating—

‘First. The presiding judge of the court is a material witness for the party making the application.

‘Second. When either party to an action pending before any district court shall make and file an affidavit of the bias, prejudice, or interest of the judge before whom the said cause is pending.

‘Upon the filing of such affidavit in either case the presiding judge shall proceed no further in said cause, but another judge shall be appointed to hear and determine said cause.’ ”*

HOUSE OF REPRESENTATIVES, FEBRUARY 15, 1911.

The House had under consideration “the bill H. R. 23377, known as the codification bill” (p. 2606, foot column 1).

At p. 2626, Mr. Cullop of Indiana asked to withdraw an amendment to Section 20 which he had submitted on

* Mr. Cullop’s proposed amendment to Section 20 of the Judicial Code was of course taken from the statute of Indiana (Burns Ann. Ind. Stats. 1914, Vol. 1, p. 297), which reads as follows:

“The Court in term, or the judge thereof in vacation, shall change the venue of any civil action upon the application of either party, made upon affidavit showing one or more of the following causes:

First. That the judge has been engaged as counsel in the cause prior to his election or appointment as judge, or is otherwise interested in the cause.

Second. That the judge is kin to either party.

Third. That the opposite party has an undue influence over the citizens of the county, etc.

* * * * *

Seventh. When either party shall make and file an affidavit of the bias, prejudice, or interest of the judge before whom the said cause is pending.”

December 14th, 1910. This was agreed to, and he thereupon offered as an amendment to the codification bill a new section to be known as Section 20a. This section is the basis of Section 21, as it now exists, and it received its number 21 on March 2, 1911, as will hereinafter appear.

Section 20a thus proposed read as follows:

“Sec. 20a. Whenever a party to any action or proceeding, civil or criminal, shall file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section 23, to hear such matter. Every such affidavit shall set forth reasons for the belief that such bias or prejudice exists, and shall be filed not less than 10 days before the time set for the trial or hearing of the case, or good cause be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit.”

Section 21 as adopted reads as follows:

“Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than

one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

Let us now account for the changes:

(a) The section as proposed said "shall file an affidavit"; the section as passed reads "shall *make and* file an affidavit."

The reason for this change was suggested by Mr. Mann (p. 2627, top column two; also p. 2628, first half column one), who said that in Illinois it was a common practice to pick up men on the street to make an affidavit. The amendment was designed to require the affidavit to be the affidavit of the litigant.

(b) It is to be observed that the section as proposed by Mr. Cullop provided that "such affidavit shall set forth reasons for the belief", whereas the section as passed provides that the affidavit "shall *state the facts and* the reasons for the belief."

In connection with the clause as proposed by Mr. Cullop, he was asked if the provision that "such affidavit shall set forth reasons for the belief" left it to the judge to determine whether those reasons were sufficient. To this he replied (p. 2627, top column one):

"MR. CULLOP. No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to sue-

ceed him.* *It does not say that he shall state the facts,†* but the reasons for the belief that he has that the judge is biased or prejudiced in the case.”

A colloquy occurred in respect of the reason and meaning of the provision requiring reasons to be given. This was as follows (p. 2629, column one):

“Mr. MANN. What is the purpose that the gentleman has in mind, in requiring that the affidavit shall state the reason?

Mr. CULLOP. The reason for the belief that he entertains?

Mr. MANN. What is the reason for putting that in, I mean?

Mr. CULLOP. *I have done that at the suggestion of the committee. It was not my own purpose to do that.‡*

Mr. MANN. That is what I wanted to get at.

Mr. CULLOP. It was the suggestion of the committee, that it might correct any abuses that might grow up under this provision.

Mr. MANN. It has been suggested here by Members that, under this amendment offered by the gentleman, the judge would have a discretion in passing upon the matter, and he would have the right to examine and ascertain whether the reasons were sufficient. Now, that

*It is evident that Mr. Cullop was in error in making the suggestion that the sufficiency of the disqualifying affidavit would be passed upon by the judge who was called in to succeed the disqualified judge. The fact that a judge steps aside in order that another judge may take jurisdiction of the case involves the conception that it has been determined either by the law or by the judge sought to be disqualified that the proceedings are sufficient.

†Mr. Cullop here gives evidence of his belief that if the affidavit were required to state the facts, then the question of the sufficiency of those facts would have to be passed upon. Later, as we shall show, Congress required the affidavit to set up the facts, and this circumstance would seem to upset Mr. Cullop's views just expressed.

‡In other words, the provision in Section 21 of the Judicial Code that the reasons should be stated was a requirement of the Committee, whose ideas in respect of the legislation might have been different from the ideas of Mr. Cullop. In Mr. Cullop's state (Indiana) the reasons were not required to be given, but it has been decided even in that state that if the reasons are given, the sufficiency of the affidavit is to be tested by the sufficiency of the reasons given. (Hays v. Morgan [1882] 87 Ind. 231.)

is plainly not the purpose of the gentleman from Indiana. Is there any reason why it should be left in uncertainty?

Mr. BENNET of New York. Not at all.

Mr. MANN. When you undertake to say that a man shall file an affidavit of prejudice, and give the reason for his prejudice, is there not some question as to whether that does not permit the judge to pass upon the reasons? Otherwise, what is the object of giving the reason?

Mr. CULLOP. No; because the very provision of the statute is that he shall proceed no further."

This is all the discussion that there was in the House about the meaning of the clause in respect of the facts and reasons for the belief.

(c) It will be noted that it was provided that the affidavit should be filed "not less than 10 days before the time set for the trial or hearing of the case."

This provision gave rise to a good deal of debate (pp. 2628-2630) and finally resulted in the provision that it "shall be filed not less than 10 days before the beginning of the term of the court" (p. 2630, column one).

(d) The last sentence of Section 21 as it now exists was added in the House February 15, 1911 (p. 2630, column one).

This last sentence reads as follows:

"The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

(e) "Good cause shown" was considered in the debates of February 15, 1911.

"Mr. BENNET of New York. That is true, but who is to construe the language 'for good cause shown'? Suppose the judge says it is not a good cause.

Mr. CULLOP. That judge can not pass upon that question. *What judge could say that it was not good cause when a man said he did not know of the existence of the cause before the time he filed his affidavit?**

Mr. BENNET of New York. Why put the language in at all? Whenever you put language in like that it is open to construction. You make it discretionary, and discretionary to whom? To the very judge whom you want to take off the bench."

[P. 2628, foot of column two.]

This question was not settled, however, because Mr. Cullop went on to instance a case where the affidavit showed "that the reason for the change was unknown to him before the time that he files it."

Mr. Bennet's question, therefore, continues to be pertinent.

(f) During the debate in the House, the words "or his counsel" were added to the section so that, as reported, it read "Whenever a party, or his counsel, to any action or proceeding", etc. (p. 2628, column one, foot). This was afterwards stricken out at the instance of the Senate conferees, as will hereinafter appear (p. 3998, column one, second half).

(g) At the close of the consideration of Section 20a on February 15th, 1911, we find that that section as agreed to in the Committee of the Whole in the House (p. 2628, column one, foot) was identical with the Section as offered by Mr. Cullop (p. 2626, column two, second half), except in two particulars: The words "or his

*It did not occur to Mr. Cullop that the question of good cause would ever arise except in a case in which a man said he did not know of the existence of the cause until he filed his affidavit, and therefore Mr. Cullop made no adequate explanation of the office and function of the provision that the affidavit must be filed in time or good cause shown why it was not filed.

counsel” were inserted, and the words “make and” were added, thus authorizing the affidavit to be made by “a party, or his counsel”, and also making the clause read “shall *make and* file an affidavit.”

(h) The requirement of a certificate of counsel was first inserted by the Senate (see proceedings of the House, p. 4001, column two, second half, hereafter quoted), and then agreed to by the House as a part of the amendments proposed by the Senate conferees (see proceedings of the House, p. 3998, column one, second half).

(i) The provision requiring the affidavit to contain the facts was proposed by the Senate conferees and agreed to in the House March 2, 1911 (p. 3998, column one, second half, hereafter quoted).

HOUSE OF REPRESENTATIVES, MARCH 2, 1911.

In the House March 2, 1911, the following proceedings occurred:

“CODIFICATION OF THE LAWS RELATING TO THE JUDICIARY.”

Mr. MOON of Pennsylvania. Mr. Speaker, I submit a conference report on the bill (S. 7031) to codify, revise, and amend the laws relating to the judiciary, and I ask unanimous consent that the statement may be read in lieu of the report.

The SPEAKER. Is there objection?

There was no objection.

Mr. PARKER. I reserve points of order on the report.

Mr. SPEAKER. The Clerk will read the statement.

The conference report and statement are as follows:

CONFERENCE REPORT.

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the

bill S. 7031, being a bill to codify, revise, and amend the laws relating to the judiciary, having met, after full and free conference, have agreed to recommend, and do recommend, to their respective Houses as follows:

That the Senate agree to the House amendment, with amendments to sections * * * 21 * * *.

That the House agree to the amendments proposed by the Senate conferees, as follows:

(The references to section numbers and pages are to the bill as reported by the conferees and not to the bill as it passed the House or Senate.)

* * * * *

Section 21. On page 10, in line 13, strike out the words 'or his counsel.' In line 22, before the word 'reason,' insert the words 'facts and the.' In line 22, after the word 'cause,' insert the word 'shall.' On page 11, line 2, after the word 'affidavit,' insert the words 'and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.'

[P. 3998, column one, second half.]

* * * * *

R. O. MOON [Pa.,
HERBERT PARSONS [N. Y.,
SWAGAR SHERLEY [Ky.,
Managers on the part of the House.
W. B. HEYBURN [Idaho],
GEO. SUTHERLAND [Utah],
JAMES P. CLARKE [Ark.,
*Managers on the part of the Senate.**

STATEMENT.

An exactly similar bill was introduced both in the Senate and House, the Senate bill being S. 7031 and the House bill H. R. 23377. After the House had considered

*It will be noted that Mr. Sherley of Kentucky was one of the Conference Committee, and that Senator Heyburn of Idaho was another. In these two states disqualifying affidavits are required to state the facts. In the other four states represented in the Conference Committee (Pennsylvania, New York, Utah and Arkansas), there is no legislation of the type here involved.

the bill for a number of days the Senate bill was passed and was sent to the House; whereupon the House took up the Senate bill, struck out all after the enacting clause, and substituted therefor the House bill.

In this statement the sections are the sections of the bill as reported by the conferees. The figures in brackets refer to the sections of the bill at it passed the House.

The Senate, in its consideration of the bill, adopted a number of amendments. Many of these amendments were of a mere formal character, to wit:

* * * * *

To all of these formal amendments the conferees on the part of the House assented.

The other amendments made by the Senate embracing substantive changes were as follows:

* * * * *

In all of the other amendments made by the House the Senate concurred, with amendments as follows:

Section 21 [20A]. The challenging of a judge on account of personal bias or prejudice. An amendment was made which required the counsel of record to certify that in his judgment the affidavit so filed was made in good faith."

[P. 4001, columns one and two.]

The report of the conferees was adopted. (See p. 4012, column two, top.)

